


CONSIDERATIONS

ON THE

LAW OF INSOLVENCY.



JAM VERO ILLUD STULTISSIMUM, EXISTIMARE OMNIA
 JUSTA ESSE, QUÆ SCITA SINT IN POPULORUM INSTITUTIS
 AUT LEGIBUS. ETIAMNE, SI OMNES ATHENIENSES DELECTA-
 RENTUR TYRANNICIS LEGIBUS, NUM IDCIRCO HÆ LEGES
 JUSTÆ HABERENTUR? EST ENIM UNUM JUS, QUO DEVINCTA
 EST HOMINUM SOCIETAS, ET QUOD LEX CONSTITUIT UNA:
 QUÆ LEX EST RECTA RATIO IMPERANDI ATQUE PROHI-
 BENDI: QUAM QUI IGNORAT, IS EST INJUSTUS, SIVE EST
 ILLA SCRIPTA USPIAM, SIVE NUSQUAM.



CIC. DE LEG. LIB. I.

BY JAMES BLAND BURGESS, ESQ.

OF LINCOLN'S INN.

L O N D O N
 PRINTED FOR T. CADELL, IN THE STRAND.

MDCCLXXXIII

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WITH A

PROPOSAL

FOR A

REFORM.

By JAMES BLAND BURGES, Esq;

OF LINCOLN'S-INN.

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that the endowment of many of the members of the Society, obtained for the General and permanent good of mankind, have proved ineffectual. The neglected state of industry, and continuing to the neglect has resulted in the decline and to even in the public fabric.

INTRODUCTION.

THE system of Insolvency, which at present prevails in this country, has, for some time past, been very loudly and very justly reprobated. Several attempts have been made to put it on a better footing; but these attempts have all miscarried, or, at least, have been attended with advantages too partial and too inconsiderable to be productive of material benefit.

The cause of this bad success is not difficult to discover. It is not enough that a legislator should possess a benevolent heart, that he should feel for the distressed of his fellow citizens, and that he should be desirous of relieving them. Without a knowledge of the causes whence these evils have arisen, without an investigation of their history, it is impossible to effect a reformation. To this it is owing,

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that the endeavours of many humane members of our senate, calculated for the general and permanent good of mankind, have proved ineffectual. The undiscovered cause of mischief, still continuing to work in secret, has never failed to undermine and to overturn the baseless fabric.

Convinced of this truth, the author of the following pages has endeavoured to investigate these causes, and to consider the History of Insolvency in a more regular manner than hitherto has been attempted. He has gone farther; he has dared to suggest some hints of alteration and improvement. The universal importance of the subject must prove the excuse of his presumption. No other motive could have induced him to lay his sentiments before the public, or to encounter those dangers, which must always attend on a publication, the single object of which is the discovery of truth.

It may possibly be objected, that an investigation of this nature requires a great extent of legal knowledge, and a long experience of the commercial interests of this country. Undoubtedly it does; and the man who wishes to perform it with effect, should possess a competent share of both these requisites. It happens, however, that those who, from long experience and great professional knowledge, are best calculated to enter on such a task, generally are the last to undertake it: an extensive practice sufficiently engages their time, and engrosses their attention. To some one, therefore, of greater leisure, though of fewer qualifications, this undertaking must be left. He may not, perhaps, use every argument which might be adduced; he may not sufficiently enforce every argument which he adduces. But, if he shall happily strike out any lights on this dark and neglected

lected subject; if he shall open a path, and discover a field to be explored by some more happy and extensive genius, his labours will not be useless, nor will his time have been misapplied.

Of Insolvents there are two species: those, who are subject to the ancient and constitutional law; and those, who either by the declarations or the connivance of the legislature, or by the interpretations and the incroachments of different Courts of Justice, have been drawn from the limits of that sacred institution, and have been included within the pale of impolitic and partial Codes. These several species of Insolvents are commonly distinguished by the terms of Privileged and Unprivileged persons. Of the former we shall say but little; with regard to them, it will be sufficient to give some account of what that constitutional law is, to which only such Insolvents are subject. Unprivileged Insolvency will require a more copious investigation. Under this denomination are included all those persons who at present are liable to Arrests for Debt, or to Commissions of Bankruptcy. As to one or other of these the greater part of our fellow citizens is exposed, the consideration of the several steps, by which these material variations from the constitutional law were effected, cannot be unacceptable to the public. In the following pages, we purpose to trace these steps, to mark the several gradations by which the present systems have arrived at maturity, to point out the existing evils, and to offer a plan of reformation. As the discovery of truth is the single object of our enquiry, we hope we shall not be diverted from that pursuit, by any partiality to favourite notions, or by any apprehension of offending those, whose interest it may be that no alterations should be made.

However free any of the following observations may be deemed, however they may reflect upon existing usages or statutes; let it be remembered, that where Laws and Customs are a censure on themselves, the impartial commentator will always be considered as a satirist.

P A R T I.

C H A P. I.

IN every legal research, the first step to be taken is a review of original principles. We may be acquainted with the general opinion of mankind, we may know the determinations of courts of justice, we may be conversant with the established practice; but we shall be ignorant of the reasons of these determinations, and of the causes of this practice, if we do not recur to the source whence they have been derived. This source is the Common Law.

In order to comprehend the true force and meaning of an act of parliament, we must consider why, and on what occasion it was made. We shall find that all statutes owe their origin to one of these two reasons; either because it was esteemed necessary to explain, or to enforce the common law; or because the legislature thought fit to amend or to alter it. The prudence or the propriety of either of these reasons cannot be known, unless we know how the

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common law stood before it was so corrected. We should therefore establish this point, before we proceed to treat on the subsequent variation. We shall afterwards be better able to determine how far such variation was warrantable, and how far it may have either benefited or injured the community. But, after we have gained this necessary information, much remains to be done. It is not enough to know that the common law has been altered, or that the usage, founded upon that variation, at this moment exists. We must trace the progress of it step by step, and follow it through all its mazes with a jealous attention.

The common law has always been so highly esteemed, that nothing has been considered as able to effect a change in it but an act of parliament. That act of parliament must be discovered; it must be cautiously investigated. If it shall be found to alter the common law, we must then consider in what respects, and how far it alters it. For in this case, a latitude of construction cannot be admitted. The common law can be affected only by positive expressions. So much of it, as the declared intention of the legislature reaches, and no more, can be impeached.

It may however be possible, that, although such a statute has been made, it may now have ceased to exist. The same power which gave it birth, may have consigned it to oblivion, either by a direct or by a virtual repeal. In the former case, the common law, without any opposition, instantly resumes its original force. But, in the case of a virtual repeal, much room is often left to the ingenuity or the casuistry of those who may be interested in the preservation of a favourite act. Where much is at stake, an argument will seldom be wanting. From inattention, or from prejudice, its fallacy may per-
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haps be long unperceived by those who are delegated to administer the laws. The judgements of early courts may be pronounced in its favour; and subsequent magistrates may adopt the decisions of their predecessors. They may find it easier, in similar cases, to judge as others have judged before them, than, by investigating principles, to introduce a new decision; till at length errors will be received for truths, and injustice will currently pass for sterling justice.

Although it must be well known to professional men, yet perhaps it may not generally be known, that the practice of imprisonment for debt was a stranger to the common law, both as it stood originally, and as it was afterwards confirmed by the Great Charter. To introduce it, therefore, a positive law was indispensably necessary. If no such law exists, the common law is unchanged, and the practice is illegal. If such a law was made; if it flourished for a season, and afterwards was repealed; the common law has resumed its vigour.

By the common law, the process in cases of debtor and creditor was benevolent and wise. The legislators of those early times pursued the dictates of natural justice. They relieved the creditor, but held out no temptation to his avarice, or to his vengeance: they compelled the debtor to be honest; but they did not render him incapable of ever being industrious or useful.

When a creditor found it necessary to compel the payment of a debt, his first step was to sue out an original writ from the Court of Chancery against his debtor.

At the same time, however, that the law thus afforded assistance to the Plaintiff, it did not forget the interest of the Defendant. Had no precautions been taken when such writs were granted, the peace

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and the property of innocent individuals would have been liable to the invasion of every malevolent or mischievous person, and the majesty of the executive power would have been insulted with impunity. Writs might have been granted in fictitious and vexatious suits, in which the Plaintiff had no cause of action, and which he had no intention to support. To prevent so dangerous an evil, and to protect the subject from frivolous and insidious prosecutions, security was required from the plaintiff for prosecuting his claim. For, although the law was always ready to afford assistance to those who were justly intitled to it, it deemed those deserving of punishment who dared to prosecute without cause. Thus wisely administering relief where due, and chastizing the illicit efforts of personal malice.

The security thus required consisted of pledges or sureties found by the plaintiff, who became answerable that he should prosecute his suit with effect to judgement, and not trifle with the dignity of the court, or put the defendant to unnecessary trouble or expence. And these were not to be nominal pledges, found merely to satisfy the formality of the law; such phantoms as now disgrace the practice and the practitioners. They were expected to be men of substance and notoriety, sufficient to fulfill the real purpose for which they were intended. For, if it happened that the plaintiff was nonsuited, or failed in the prosecution of his demand, not only he, but his sureties, became liable to an amercement.

Thus equal was the balance. In every case, a door was opened to the plaintiff, for certain, cheap, and expeditious justice: but due precautions were used to preserve this privilege from abuse; to defend the innocent and unsuspecting from the shaft of malevolence, or the vengeance of oppression.

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The plaintiff being in this manner possessed of the original writ, the law afforded to him the means of proceeding upon it. The first step which it prescribed, was the summons or citation of the defendant, to appear in court on the return of the writ; which was either served on him personally, or left at his dwelling, or on his land, by proper officers appointed for that purpose.

This notice the defendant was expected to obey. If he neglected to do so, or if he proved contumacious, a writ of attachment was issued, directed to the Sheriff, commanding him to attach the defendant, not personally, but by taking part of his goods, which became forfeited if he did not appear; or by making him find sureties, who might be responsible for his appearance, and who, in case of failure, were subjected to an amercement.

If, after attachment, the defendant neglected or refused to appear, the law afforded to the plaintiff a further and more forcible process. For, besides the forfeiture of the goods attached, and the amercement of his sureties, a writ of *Distringas*, or distress infinite, went forth. By this the sheriff was commanded to distrain the defendant, by all his goods and the profits of his lands within his bailiwick, wheresoever and whensoever he should be able to meet with them; all of which became forfeited to the King, in case the defendant should still persist in his negligence or contumacy. The debtor had his choice, either of absolute ruin, or of appearing to the process of his creditor. The alternative hardly admitted of a doubt, and common sense pointed out the expediency of a submission to the judicature of his country. Upon his appearance in court, he either acknowledged or controverted the claim of the creditor; and the affair was legally determined, on the hearing of evidence, by the verdict of twelve men.

Such

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Such was the process used by our ancestors. Such is the process to which Privileged Insolvents are at present liable: It is equally simple, complete, and satisfactory; calculated to satisfy the creditor, yet to restrain his oppression; to compel the debtor to pay, but to protect him in the enjoyment of his natural rights.

If the reasoning already laid down be true, the same process must continue generally to be law at this day, unless it has been altered, and unless some other process has been introduced by some positive act or acts of parliament. That various attempts have been made to change it for something, convenient perhaps for individuals, yet highly detrimental to the community, is a fact not to be disputed. But attempts alone are insufficient to accomplish this purpose. Nothing less than a positive statute, and that unrepealed, can impeach the force of this great and original law. It may bend awhile beneath the stroke; but, Antæus-like, it will rise with double vigour, and acquire renewed force from the impotence of the attack.

C H A P. II.

THE original process, of which we treated in the last chapter, continued for a considerable time unimpeached. However the power of individuals might occasionally have trespassed against it, such trespasses had not the sanction either of the Legislature or of Courts of Justice. It was considered as the law of the land, and the personal liberty of Englishmen was respected.

By the most antient of our statutes, the Great Charter, this process and these liberties were confirmed. We will consider those sections of it which particularly relate to this subject. From these we shall find, that personal freedom was completely secured; that the subject was protected from every invidious or oppressive attempt to deprive him of those liberties, which the laws of his country had declared to be his natural and unalienable right.

In the preamble to this charter, the King, "for the exaltation of the holy church, and the amendment of his kingdom, by his own free good-will, gives and grants to all his subjects the several underwritten liberties, to be maintained in his kingdom of England for ever." He makes use of the most determinate expressions, in order to avoid every appearance of doubt or uncertainty. He not only grants and confirms all these liberties to his subjects for ever, but he asserts that he does this by his own good and voluntary inclination; to prove that he purposed to maintain them, and as an assurance that he never would seek to avoid or to subvert them, on any plea of duress or coercion. These words, as
 Lord

Lord Coke observes *, were added to avoid all scruples, that this great and parliamentary Charter might live and take effect in all successions of ages for ever.

Of this Charter, the eighth section, which has for its object the regulation of the crown debtors, is the first which relates to our purpose.

In the earlier ages of our constitution, the King claimed and exercised a power of taking in execution, as well the body, as the lands and goods of his debtor †; an exclusive privilege, the fruit of an undefined prerogative, unauthorized by any existing law. To prevent a practice, so liable to be converted to the purposes of oppression, and so contradictory to the rights of mankind, it was now declared, that for the future “Neither the King nor his bailiffs
“should seize any land or rent for any debt, so long
“as the present goods and chattels of the debtor
“should suffice to pay the debt, and the debtor himself
“be ready thence to satisfy it; that the pledges
“of the debtor should not be distrained, so long as
“the principal debtor should be sufficient for the
“payment of the debt; and that if the principal
“debtor should fail in payment of the debt, having
“nothing wherewith to pay, or should refuse to pay
“when able, the pledges should answer for the debt.”

We cannot but observe the contemptuous manner in which the Barons treated the power, so long assumed by the Crown, of taking the body of a debtor in execution. They did not even vouchsafe to take notice that such a custom existed; they passed it over with a disdainful silence, and proceeded to limit the authority of the King over the lands of his debtor. It was however their firm intention to abolish this unreasonable power, and their intention was crowned with success ‡.

* 2 Inst. 2.

† 2 Inst. 19.

‡ 2 Inst. 19.

If the power of the King was thus abridged, if it was become illegal for him, who, until then, alone enjoyed the privilege of seizing and confining his debtor, to proceed otherwise than first against his chattels, and, in the last resort, against his lands; it clearly follows, that no pretence existed to justify one citizen of this country in taking the body of another citizen in execution. The King himself exercised this odious distinction merely as a pretended breach of his Prerogative. By Prerogative nothing can be meant but an exclusive right, a power distinct from and incommunicable to all others. When, therefore, such a power was exercised by the King, it could not have been exercised by any subject: when it was taken from the King, it must have been altogether extinguished.

The other section of this charter, which immediately concerns our purpose, is the twenty-ninth: a section which breathes the spirit of wisdom and of mercy, which asserts the unalienable rights of humanity, and which is justly considered as the foundation of our boasted English liberties. This excellent law was intended to benefit all ranks of mankind; it extended even to Villeins, who were esteemed to be free against all men, except against their Lord*. By its operation, "no man, on whatsoever account, " can be arrested, or be imprisoned, or can be deprived of his free-tenement, his liberties, or his free-customs, or can be outlawed, or be exiled, or be in any manner oppressed or destroyed, unless by the legal judgement of his peers, or by the law of the land." Within the same constitutional limits are confined all process of the Crown, and all the King's writs. The course of justice is to be open to every individual; the King is neither to sell, nor

* 2 Inst 45.

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to deny, nor to delay, to any one that justice and that right to which every free citizen is entitled.

We may observe, that, in framing this statute, the first grievances provided against are illegal arrests and imprisonments. Our ancestors wisely thought, that, of all civil injuries, the infringement of the natural rights of human nature was the most atrocious. They therefore were careful, in the first place, to provide against it. Where the liberty of the person is restrained, but little advantage can be derived from a disposal of property; when that is secured, a small proportion of riches is sufficient to bestow happiness.

From the year 1225, when this Charter was published, to the year 1266 *, a number of laws was made, confirmatory of the liberties which it contained. At this latter period, when no act of parliament had been passed to affect the freedom of the subject, it may be proper to stop, for the purpose of contemplating the effect, which the Great Charter and these several confirmatory statutes had upon the Common Law. It is evident, that the original process in cases of debt, so far from being affected or impeached, was confirmed; that the incroachments, which an arbitrary power had introduced, were removed. It was also declared, that no one should be arrested or imprisoned, otherwise than by the judgement of his equals, or by the law of the land. The consequence is, that, both by the common law and by these statutes, the body of a debtor was, at that time, in all cases considered as free. We shall therefore be justified in assuming this as the ground of our future argument, that, in the year 1266, imprisonment for debt was no less contrary to the practice, than it was to the spirit of the English Law.

* Parl. Hist. v. I. pag. 73.

C H A P. III.

THE period with which the preceding chapter terminated is highly deserving of our attention, as the moment, at which the general rights of human nature, and the personal liberty of the individual, rose higher in this country than perhaps at any other time before or since. The Great Charter was pronounced to be inviolable; and the common law process, in cases of debtor and creditor, continued to be held sacred. No public authority, no private interest, could affect the freedom of the citizen. No man could be imprisoned for debt; no man could be imprisoned for any offence, unless the judgement of his equals pronounced him unworthy of liberty, or the direct letter of the law justified his confinement.

If we draw a comparison between this state of real liberty and our own present situation, we cannot but be struck with the visible difference. The process in cases of Insolvency is entirely changed; a debtor, whether honest or dishonest, or unfortunate, is now altogether at the mercy of his creditor; who may, at his option, condemn him to perpetual bondage, or stipulate for his freedom at the price of the most ruinous and unworthy concessions. The Great Charter is infringed in its most momentous point. Thousands are immersed in our gaols in direct opposition to its precept. The oath of the interested party, not the verdict of a jury, is deemed sufficient to warrant their imprisonment.

But how, may it be asked, can this change have been effected? Where positive laws exist, they must
continue

continue in force until other laws, sufficient to repeal them, are made. Such a repeal has doubtless taken place ; for by what other authority could Courts of Justice dare to proceed ?

However extraordinary it may appear to those un-conversant with our statute-book, and with the practice of our Courts of Justice, it is most certain, that, although this momentous alteration has been effected, no such repeal has been made. It is equally certain, that no such repeal can be made : the Great Charter cannot be repealed. It ever has been, it still is, the foundation of our liberties, and the bulwark of our constitution. No incroachment, however sanctified by custom, should be allowed to prevail against it ; no court, no minister of justice, by any connivance, suggestion, or collusion, is empowered to infringe or to impeach it. If therefore the Great Charter is thus inviolable ; in all cases where no positive law exists to warrant the practice of imprisonment for debt, the usage, however general, must be illegal, and the courts which adopt it must act illegally. The object of the following pages is to evince the truth of these assertions, by tracing the history of this custom ; a history unknown to the generality of mankind, but which it behoves every Englishman thoroughly to know. Where the liberty of thousands is restrained, the causes of their confinement require investigation.

In the course of our researches, we have hitherto met with nothing but confirmations of the personal liberty of the subject. We come now to a period, not less important, though infinitely more curious ; in which the legislature appears to have adopted a new line of conduct, the most extraordinary, and apparently the most unaccountable, which the history of this or of any other country can display. In the same breath it asserts the freedom of the citizen, and condemns him to captivity ; it claims the right of trial

trial by jury, and declares the freeman to be liable to imprisonment at the single option of his interested creditor; it vindicates the inviolability of Magna Charta, and subverts its most important clause. A conduct so opposite to every principle of reason can hardly be accounted for. Its palpable inconsistency precludes an argument. Where it appears so difficult to assign it to any probable cause, we may perhaps be permitted to advance a theory, and to attribute this conduct to the constitution of those early parliaments, and the enormous and oppressive power of the Aristocracy. The Commons were not then, as they are now, the jealous guardians of the rights of the community; they had not discovered their own constitutional weight; and the Barons, who possessed the greater part of the property, were able to direct the councils of the nation. The general assertion and conservation of the natural rights of mankind affected equally the whole people: the rich and the great, as well as the indigent and the feeble, assimilated by the common bond of humanity, maintained unanimously that liberty which they had received from nature. But here the union ended. The artificial distinctions of society, the caprice of the powerful, and the rapacity of the avaricious, created different interests. General liberty was to be maintained, because, without that, the rich and the great themselves would not have been secure. But the oppression and the bondage of individuals was to be countenanced, because, without that, the riches and the greatness of the Aristocracy could not so readily have been maintained. In the former case, the nobility might have been victims; in the latter, they were only oppressors. We cannot wonder that debtors were enslaved by law, when creditors were the law-givers.

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The course of parliamentary proceedings affords us an instance confirmatory of this reasoning so early as the year 1267 ; the very year after the period with which the preceding chapter concluded. By the fifth chapter of the statute of Marleberge, which was passed in the fifty-second year of Henry III. the Great Charter was absolutely confirmed, in the strongest and most unequivocal terms *. But, notwithstanding this plain avowal of the general liberties of the people, a law was immediately after made, which appears as the twenty-third chapter of the same statute, evidently calculated to promote the interests of the nobility : a small part, indeed, of the community, but the only part which possessed sufficient influence or power to make it necessary for the sovereign to cultivate their good-will.

This remarkable act, being the foundation of imprisonment for debt, demands our serious attention. A custom become venerable from age, whether originally good or bad, should not lightly be abandoned ; we ought to venerate even the errors of our fore-fathers. It behoves us, before we pronounce a judgement, to consider the question in every point of view. But, after an impartial discussion, we should not hesitate to condemn and to abandon it, if we discover it to be unfounded in principle, or impolitic in effect.

This first enslaving law is couched in the following terms : “ It is provided, that if bailiffs, which ought

* Magna Charta in singulis suis articulis teneatur, tam in hiis que ad regem pertinent, quam ad alios ; et hoc coram justiciariis itinerantibus in suis itineribus, et vicecomitibus in comitatibus suis, cum opus fuerit, demandetur, et brevia versus eos, qui contravenerint, gratis concedantur coram rege, vel coram justiciariis de Banco, vel coram justiciariis itinerantibus, cum in partes illas venerint.

“ to make account to their lords, do withdraw themselves, and have no lands or tenements whereby they may be distrained, then they shall be attached by their bodies, so that the Sheriff, in whose bailiwick they be found, shall cause them to come to make their account.”

In this short act, there are five observable points : First, the debtor must be a bailiff. Secondly, he must have accounts to make. Thirdly, he must withdraw himself. Fourthly, he must have no lands or tenements whereby he may be distrained. Fifthly, the object of the attachment is simply to compel the appearance of persons coming under these predicaments in order to make up their accounts.

It is an acknowledged principle of legal construction, that a statute, which operates against the common law, or which invades the right of a subject, and tends to deprive him of his privileges, shall be strictly construed. Nay, so much is the liberty of a freeman favoured in law, that a benign interpretation is ever to be made for its benefit *. In no case should this construction be more attentively adhered to, than where a partial law is made to deprive any man, or any set of men, of those primary rights which they hold as the gift of nature. Such a despoiling law is that before us. Let us therefore examine it according to this principle, without tying ourselves down to those narrow interpretations which may at different times have prevailed.

The word *Ballivus*, as used in this statute, is of as plain a meaning as any word to be found in our law books. *Ballivi* were the persons employed by lords of manors to collect their rents, and to levy their fines and amerciaments. To these, therefore, as the only persons named in the act, the act should be con-

* 2 Inst. 115.

fined. But the courts soon established a different and more enlarged construction*. They held this act to extend, not only to bailiffs according to the letter, but to guardians in socage†, receivers and other accountants. When they had gone thus far to extend the boundaries of this act, and had included within them denominations of men to which it is plain the statute did not extend, it seems extraordinary that any new delicacy should have restrained them from enlarging their jurisdiction over other classes, certainly as open to their incroachment as those on which they had already seized. But, to whatever cause this inconsistency may be ascribed, certain it is, that a distinction was made‡. For it was held, that no writ of account would lie against a servant, as servant, or against an apprentice, or a comptroller, a surveyor, a messenger, or the like, unless they were charged as bailiffs or receivers. Whatever arbitrary determinations, however, either of including or of excluding any particular classes of men, might have been made, it is clear, that those alone who properly came within the description of Bailivi, could have been

* 2 Inst. 144. 17 Edw. III. pl. 59. § 55. Accompt. F. N. B. 117.

† The first existing case, in which it was resolved that this statute extended to receivers, appears in the year book, 4 Edw. II. Brief 761. But it seems to have been considered as extending to a guardian in socage long before. Britt. 163. b. A great writer, however, affirms the contrary. This is no other than Sir Edward Coke himself, whose authority we have taken to prove that guardians in socage were included. In his Commentary on Littleton, fol. 89. a. he says, that later books have over-ruled the doctrine laid down by Britton, *no capias lying against guardian in socage; for the statute extendeth to bailiffs only.* With all due reverence to the venerable father of the English law, it appears somewhat difficult to reconcile such contradictory opinions.

‡ 2 Inst. 379.

comprehended within the operation of this act, supposing, for the sake of argument, the act to have any operation at all.

But before even these could be affected, other preliminaries were to be discussed. The bailiff must have had accounts to make up. He must have withdrawn himself. Had he been ever so deficient, or ever so insolvent, there was no power given to arrest him so long as he remained within the manor. The lord might, as the common law gave him power, distrain to the uttermost; the body of the defaulter was still secure.

But supposing this bailiff to have been accountable, and to have withdrawn, another indispensable circumstance remained; he must have had no lands or tenements on which the distress of the lord could operate *. For if the accountants had any lands or tenements whereby they might be distrained, although they were not equal to the discharge of the demand, yet were they sufficient to exempt them out of this statute. But these lands and tenements must have been at least for term of life †; nor were lands, whereof a man was seised in right of his wife, held to be such lands as would affect the operation of this statute ‡. Certain however it is, that any land, which a man held de jure suo, and for a term for life or other greater estate, was sufficient to protect him from an arrest at the suit of his lord ||. And if any one dared to sue out the writ grounded on this statute §, called the writ of *Monstravit de compoto*, and to attach the body of the accountant, where he had lands and tenements, a writ ** was provided for the relief

* 2 Inst. 144.

† 2 Inst. *ibid.*

‡ 4 Edw. II. Brief 791. 6 Hen. VI. Brief 806.

|| 4 Edw. II. Brief 791.

§ 2 Inst. 144.

** Regist. 137.

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of the party aggrieved, who had a remedy in the King's courts against his arbitrary oppressor.

It appears then that these four points were to be proved before this statute could operate; if any one of them were wanting, the lord was left to his remedy at the common law. But supposing the defaulter to have answered in every respect to the description, what remedy was afforded to the complainant? The statute gives the answer: a compulsive process to make up the account. This might be of use to those lords who were ambitious of keeping regular accounts, but it gave them no other apparent advantage, which the common-law had not already given. Before this act, the process in account was by summons, attachment, and distress infinite, as it was in all other cases between creditors and debtors. Whether the defaulter ran away, or remained on the manor, the lord was at liberty to seize upon his whole property, and to take the utmost satisfaction which it could afford him.

A more secret motive, however, appears to have actuated the framers of this law. Not contented with enjoying a privilege in common with the rest of the people, they aimed at obtaining an advantage, to be exercised by none but themselves. There was not at that time a diffusion of property, which subdivided the lands of the kingdom, and, by an equality of possession, put the lower orders of society upon a par, in point of riches and consequence, with the nobility. A few great lords monopolized the several counties, and considered the bulk of the people as no better than dependants or slaves, born for their pleasure, and existing for their profit. To complete their superiority, the power of imprisonment was still necessary. To this the Great Charter was a bar. Some expedient was necessary, and this law was devised. Nor could a better method have been invented. The

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Great Charter still operated with regard to themselves, and afforded to them a complete security. But with regard to their vassals, this sacred shield was removed from between them and captivity. The smallest appointment to receive the smallest rent was sufficient to bring the victim within the interpretation of the statute: a dexterous management, easy to the powerful, supplied the rest. The miserable wretch, unfriended and unable to resist, consumed in gaol his melancholy hours; while his lord, deriving a new accession of power from his fall, exercised a despotic sway over his trembling dependants.

Such was the foundation on which this enormous superstructure of tyranny has been erected. In its principle it was unjust; for, in justice, a creditor can be intitled to no more than the whole of his debtor's property. In its consequences it was fatal to liberty; for it subjected one half of the people to the arbitrary will of the other half; and exposed them, in an unconstitutional manner, to the loss of an inherent natural right. In its formation and execution, it was illegal; for it virtually repealed the most important branch of the Great Charter, and put the axe to the root of trials by jury. Yet, though thus replete with evils, as it oppressed only those who were too feeble to resist, and favoured those who were of too great consequence to be contradicted, it has continued to operate as a statute from the reign of Henry the Third to the present day. It has been espoused by courts of justice, and is still by them considered as a valid and an active law, although, as we shall see hereafter, it had been directly and repeatedly repealed by the solemn voice of the legislature.

In the course of these researches, we shall have occasion to observe, by what small and gradual steps the practice of imprisonment for debt arose to its present magnitude. Particular grievances of parti-

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cular persons occasioned partial laws. The legislature, proceeding surely on no just principles of reasoning, while it applied a remedy to the smaller streams, overlooked the source whence the evil flowed. An occasional mischief appeared to demand its interference; but it neither looked back to the original principles of the constitution, nor looked forward to the great and inevitable evils, to which a conduct so impolitic would give birth. We cannot therefore wonder, that such oppressions as are now common among us, gratifying the avaricious and revengeful, should exist; but we ought to wonder, that a humane and enlightened age should suffer such enormities to continue in existence.

It was to remedy one of these particular grievances that the statute of Acton-Burnel was made, in the 11th year of Edward the First, and A. D. 1283 *. The mischief complained of was, that merchants, who had advanced their goods to others, suffered great losses, because no speedy law existed whereby they might recover their debts at the day assigned for payment; in consequence of which, many merchants had foreborne to come into the kingdom with their merchandizes, not only to the damage of themselves, but to that of the whole realm. To remedy this inconvenience, it was enacted, That in the cities of London, York, Bristol, Lincoln, Winchester, and Shrewsbury, a particular process should be adopted. By virtue of this, the merchant had power to summon his debtor before the mayor, for the acknowledgement of the debt, and of the day of payment; which recognizance was to be enrolled. If the debt were not afterwards duly discharged, the moveables of the debtor, to the full amount of the demand, were to be sold by a fair appraisement, and the pro-

* Statutum de Mercatoribus 11 Edw. I.

duce was to be delivered to the creditor. If it happened that the debtor was insolvent, and had no moveables, his body was then to be taken, and to be kept in prison until a settlement with the creditor should be made, the creditor finding him in bread and water, if he were unable to support himself; which expence was to be reimbursed to him before the debtor should leave the prison. The incidental expences of the creditor, if he were a merchant-stranger, were also to be defrayed by the debtor before he could be released. The same process was to be used in those cases where there were sureties or pledges.

This statute was very confined in its salutary operation, as it was in force no where but in the places above mentioned, and benefited only a particular, and at that time not numerous order of men. But its noxious effects extended much further. It incroached on the Great Charter, and deprived multitudes of a trial by jury. It proceeded on the narrowest and falsest principles, by confining the commencement of the compulsory process of imprisonment to that moment, when imprisonment could answer no useful purpose. For, if the debtor were solvent, his moveables were to be sold to discharge the debt; if he were insolvent, and had it not in his power to pay, he was to be imprisoned. This might satisfy the vengeance of his creditor, but could answer no good purpose. The merchant did not get his money; the miserable debtor irrecoverably forfeited his liberty; his family was left without a support; and the state lost the labour and the services of an active and useful citizen.

If it were a doubtful fact, that imprisonment for debt did not at this time exist, the statute now before us were a convincing proof. Had such a custom been prevalent, the permission of it, in particular instances,

stances, would have been nugatory. A custom must exist before a variation from it can take place; whether it be active or passive, this rule holds equally good. All particular privileges imply a previous general right; for *exceptio probat regulam*. It is therefore clear, by the provision made in this act, that the practice of imprisonment for debt did not then exist.

The statute 52 Henry III. c. 23. had not been long made, before it appeared necessary to the legislature to revise the business of accountants, and to frame a new set of regulations. The history of those early times is very imperfect, and affords us little more than a dry detail of public occurrences. The great guides to a knowledge of legal and constitutional matters are the preambles to acts of parliament, which often afford us a clue, to find our way through the labyrinth of darkness and uncertainty. Unhappily, in the statute 13 Edward I. c. 11. which was framed on this occasion, the preamble is totally wanting. We are therefore left to conjecture at the reasons, which might have occasioned so speedy an alteration. The most probable supposition is, that the former act was either inadequate for the purpose intended, or had occasioned grievances which became intolerable in practice. It is not unlikely that both these bad effects might have ensued. But there is an observable difference between truth and error: the former is clear, permanent, and immutable; the latter confused, uncertain, and in perpetual variation. The law, which is framed by partiality or caprice, cannot be grounded on the fixed principles of justice. Narrow and confined as the prejudice which gave it birth, it becomes inconvenient or useless when that prejudice ceases; and requires a new modification, before it can be rendered an apt engine for the gratification of future passions or interests.

By

By the 13th Edward the First, Chapter 11, it is enacted, That when masters shall assign auditors to take the accounts of their servants, bailiffs, chamberlains, and all manner of receivers, and when, upon due allowance, they shall be found in arrear, their bodies shall be arrested, and, by the testimony of the auditors, they shall be committed to gaol, where they shall be imprisoned in irons, and shall remain at their own cost, until they fully satisfy their master for their arrears. But if the prisoner shall complain that the auditors have charged him unjustly, or have denied him the credit he was entitled to, he shall be delivered to his friends, on their undertaking to bring him before the Barons of the Exchequer. The sheriff shall give notice to the master to appear in the Exchequer, at a day fixed, with his vouchers, when the account shall be rehearsed. If the accountant shall then be found in arrear, he shall again be committed to gaol. But if he flee, and will not account, process of distress shall issue to compel his appearance. And if, after an account taken, and before payment of the arrears, he shall fly, exigents shall be awarded against him, and he shall finally be outlawed.

Having already been perhaps too diffuse in the consideration of the first accountant act, it will be unnecessary to consider those parts of this statute which coincide with the former. But our attention will be well bestowed on several points, where an observable difference may be remarked.

The operation of the act is considerably enlarged. The former statute respected only bailiffs; this includes with them servants, chamberlains, and all manner of receivers; as if the framers of it, by this comprehensive mode of expression, had resolved to draw as many as possible within the vortex of this oppressive act.

Whether

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Whether the vexations consequent on the exercise of the power of imprisonment given by the former act, or whether the murmurs of the people induced the legislature to be more circumspect in drawing up this, we cannot now determine; but a much more cautious, and apparently more legal, procedure was now introduced. Auditors were to be assigned to take the account, and the body of the debtor was not to be imprisoned until such auditors should pronounce him to be in arrear. Although this bears a specious appearance, and seems to mitigate the severity of the former process, yet, on a closer inspection, it will be found equally unconstitutional, and equally contradictory to Magna Charta. By that sacred code it is declared, That no man shall be imprisoned but by the verdict of his equals, or by the law of the land. By the law of the land, no man could be imprisoned for debt; and the summary decision of two, or perhaps more auditors, is not a verdict of a jury. The operation of this act, therefore, was an oppression upon the subject of the most insidious and dangerous kind. It militates also directly against that other clause of Magna Charta, "*Nemo aliquo modo destruatur*;" for every oppression against law, by colour of any usurped authority, is a kind of destruction*; "*quando enim aliquod prohibetur*," "*prohibetur & omne per quod devenitur ad illud*." And that oppression is of all others the worst which is done under the masque of justice.

By the former act it was necessary, before the lord had power to proceed, that the accountant should withdraw himself, and should have no lands or tenements whereby he might be distrained. But these precautions threw too many obstacles in the way, and rendered it oftentimes impossible that the statute

* 2 Inst. 46. 10 Co. 74.

should

should take effect. The present law, therefore, gave a summary process divested of these preliminary impediments. It made likewise a material alteration in the article of imprisonment. In addition to the simple attachment which was before prescribed, it ordains that the prisoner shall be charged with irons, inflicting on the unhappy defaulter the extremity of severity; a severity with which our law was at that time unacquainted*. For the common law, ever provident and anxious for the security of the subject, allowed to gaolers no such arbitrary authority.

The material diversities, and even contradictions, subsisting between these two statutes, make it difficult to imagine how they both could subsist at the same time. And indeed this idea was so prevalent, that Lord Coke thought it worth his while to contradict it†. The act of Edward the First, he affirms, hath not taken away either the effect, or the use of the act of Henry the Third; for this latter extends, not only to bailiffs, but to guardians in socage, receivers, and other accountants; but the statute of 13 Edward I. extends only to bailiffs and receivers, and not to a guardian in socage; for a *capias* lieth against him by the act of Henry the Third, but no exigent by the statute of Edward the First. To differ from so great an authority is presumptuous; but his argument surely appears to want that precision so observable in his writings. If, in one act, bailiffs could be construed to mean guardians in socage, there seems no reason to say why they should not mean the same in the other. That in the second, the word bailiff comes after the word servants, and is therefore included in it, proves nothing. A bailiff, as far as the execution of his duty goes, is no other than a servant; as Lord Coke himself, in another passage‡,

* Britt. fol. 14, 17. Mirr. c. 5. § 1. Flet. l. 1. c. 26.

† 2 Inst. 144.

‡ 2 Inst. 381.

expressly says. Besides, the premises are faulty ; for it has already been proved that, agreeably with the strict and legal construction of these statutes, the word bailiff could not be extended to include guardians in socage, receivers, and other accountants ; if it could not, the first act included none but those who corresponded with that single description : on the contrary, the second act particularly mentions servants, bailiffs, chamberlains, and all manner of receivers, and consequently of the two must include the greater number. Strange, however, and inconsistent as it may appear, both these statutes did actually continue in use ; and either of them was employed, as it seemed the best adapted to the immediate purposes of oppression.

The reader will recollect it to have been said, that the remedy given to the creditor by the common law extended no further than to a seizure of the goods and chattels of the debtor, and of the profits of his lands. The lands themselves could not be touched, any more than his body could be imprisoned. For the policy of our ancestors declared that both should be free ; the latter, to be ready for the defence of the state ; the former, to be a security for the due performance of those services, to which the superior was by the feudal institutions intitled. But when we attentively consider the different natures of these several exemptions, we shall find a material distinction between them, as well in the original principle, as in the consequences to society.

The right of personal liberty is one of those great endowments which every man brings with him into the world. No man can be born a slave ; nor can this natural right be annulled by any human law, or in any manner be impeached, but by our own concurrence, or by the operation of a violent and irresistible force. In every well-regulated state, laws
must

must be made for the security of morality and peace; to insure the observance of these laws, it is necessary that penalties should be denounced, as the consequences of an infringement. In proportion to the degree of criminality, the severity of the penalty should increase; and many offences, by manifesting the unsuitness of the offender to continue a member of society, point out imprisonment, or even death itself, as his proper punishment. But this proportion should be preserved as exactly as possible. A crime, sufficiently atrocious to call down a capital punishment, should not be punished by a confiscation of goods; nor should error, indiscretion, or poverty, entail the same penalty as that which we impose upon the felon.

——— Adfit

Regula, peccatis quæ pœnas irroget æquas,

Nec scutica dignum horribili sectère flagello.

This equal scale of crimes and punishments being once established and made known, every man is enabled to regulate his conduct so as to preserve his innocence, and to avoid the penalties. If he offends, he must patiently submit to that justice which he has knowingly provoked. He concurs in his own condemnation, by doing what he is conscious the law of nature forbids. And from the offender against the law of nature, as unworthy any longer to remain in society, the privileges which nature gave are justly taken away.

Unhappily this amiable proportion is little attended to among us. Penalties are annexed to offences, rather in proportion to their immediate inconvenience, than with a view to their specific criminality. Hence our legal history affords us a strange confusion of crimes and punishments; our statute-book is bloody as the law of Draco; our lives are precarious,

precarious, and our liberties are little more than a sound. The same prison contains the malefactor and the insolvent; with these differences, however, that the confinement of the former has an appointed period; the confinement of the latter has none: the former is imprisoned by the operation of a positive law; the imprisonment of the latter is warranted by no such sanction. For neither can a practice be lawful, which contradicts the Great Charter and the common law; nor can a mode of procedure, subversive of the natural rights of man, be introduced, even by the concurring voices of the legislature. We may establish what regulations we please in those points where human wisdom can interfere; but those superior rights, which we derive from God, should be respected by his creatures. Besides, it is perhaps no new or unsound doctrine, that no man, or set of men, can surrender a natural personal right, further than as it relates to themselves. We may beggar and disgrace ourselves, we may forfeit our liberty, we may beggar and disgrace our posterity; but, in spite of all our efforts, they will come free-men into the world.

In favour of the other principle adopted by our ancestors, that the lands of a debtor should not be seized except in the case of the Crown, no such forcible arguments can be adduced. There is a material distinction between the natural and the artificial rights of man. The former are inviolable; the latter may be modified, and adapted to the occasions of society. In these the interest of the individual should be subservient to the general good. As the enjoyment of property depends upon the public welfare, the legislature has a right to impose upon it such regulations as will best answer that purpose; and the proprietor will prefer a limited possession, to the risque of altogether losing his property. Agree-
ably

ably with this rule, the alteration made by the statute 13 Edw. I. c. 18. was both justifiable and politic. It put debtors and creditors upon a fair and equal footing, by giving an ample remedy to the one, and by subjecting as much of the estate of the other to the payment of his lawful debts, as the nature of our constitution at that time would permit. For it is clearly equitable, that where a man borrows money, or receives a valuable consideration, an adequate satisfaction should be made to the creditor; and that the whole of the debtor's property should be made liable. But we are no longer equitable if we go another step, and insist upon a *further* payment from a man who had surrendered all he had. Our reason points out the absurdity of the demand; but our daily experience evinces the enormity of the practice.

The statute just mentioned enacts, That when debt is recovered or acknowledged in the King's Courts, or damages are awarded, it shall be in the election of the plaintiff to have a writ of Fieri facias directed to the sheriff, to levy the debt on the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough), together with the one half of his land, until the debt be levied upon a reasonable price or extent. A remedy also is provided, in case the debtor shall eject him. The creditor put into possession was termed a tenant by Elegit, from the power of election thus given him. It must be observed, before we quit this statute, that this process was only the consequence of a judgement or recognition, and therefore strictly legal. And note, says Lord Coke, that a Capias ad satisfaciendum (by which the body might be arrested) is not mentioned in this statute, because no such writ did lie at the

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common law for debt, &c. or damages, but only when the original action was *Quare vi & armis* *.

By the statute 13 Edw. I. c. 230 the writ of account, of which we have already treated, was extended to executors, and the same action and process was given to them; which their testator himself might have had in his life-time. Of this it may be sufficient to say, that if the parent statute was illegal and is repealed, its offspring partook of its mischievous nature, and is equally sunk into nothing.

Notwithstanding the care which had been taken, by the statute of Acton Burnel, to provide a summary remedy for merchants, and to give them an unheard-of power over their debtors, a very short experience sufficed to shew, that even these oppressive measures did not produce the desired effect. Within two years after that act passed, repeated complaints were made by merchants, that divers of them had fallen to poverty for want of a speedy remedy, whereby their debts might be recovered at the day of payment; and that many merchants had, for that reason, refrained from coming into the realm with their merchandise. They further asserted, that although the statute of Acton Burnel had been made in their favour, they derived little benefit from it, as the sheriffs sometimes misinterpreted, and sometimes by malice and false interpretations delayed the execution of the statute, to their great detriment.

That merchants, who in those days were chiefly strangers and foreigners, should be desirous of enriching or securing themselves at the expence of the liberties of the country where they were received, is not extraordinary. It is a common, though disgusting feature of humanity. We need not cite instances from history

See Stat. 13 Edw. I. c. 230. & Stat. 13 Edw. I. c. 230. & Stat. 13 Edw. I. c. 230.

to prove it; the fate of Nundecomar and his miserable countrymen presents a picture which must strike conviction into our minds. But it does not follow, that the assertions on which these traders founded their complaints were true. The opposition of the sheriffs to the execution of the statute of Acton-Burnel had probably a nobler foundation, than either malice or false interpretation. They saw that the freedom of their fellow citizens was invaded, to promote the interest of foreigners; they wished to preserve the ancient laws against arbitrary intrusions: they therefore threw what impediments they could in the way of this oppressive law. The partial advantages of the negotiant might be diminished, but the liberty of the subject was protected: though the individual might find cause to complain, the community had reason to rejoice.

But the spirit of commerce had then just begun to shew itself in England. As a stranger, weak and helpless, it demanded assistance, and required an extraordinary interposition of the legislature. The many advantages it promised seemed to justify this interference, and it took root and flourished on the ruins of our fundamental laws.

To give this additional security to traders, it was enacted, by the statute 13 Edw. I. stat. 1. That after an acknowledgement of the debt, and of the day of payment, as in the former acts, and after a failure of payment, the body of the debtor might be committed to prison, there to remain at his own cost until he should agree with his creditor. Within a quarter of a year after his commitment, the chattels of the debtor were to be delivered to him, that by them, and by the sale of his lands (which this statute empowered him to dispose of), he might discharge the debt. If he could not settle the matter within this period; at the expiration of it, his lands and

goods were to be delivered to the merchant by a reasonable extent, who was to hold them until the debt should be wholly levied: but the body of the debtor was nevertheless to continue in prison, the merchant finding him in bread and water. Immediately upon the debt being levied, the body of the debtor was to be delivered with his lands. If he should chance to die before the debt were completely levied, the merchant was to have the lands of his heir, but had no authority to take his body.

As in those partial laws, the two accountant acts, the latter refined on the severity of the former; so we find a larger measure of oppression dealt out by this statute, than had been permitted by the statute of Acton-Burnel. No time was to be given, no allowance was to be made. Whether honest or dishonest, whether unfortunate or refractory, the debtor was instantly to be imprisoned. It might have happened, that some unavoidable accident had prevented him from discharging the debt at the appointed time; he might have been solvent, and able to pay much more than the present demand. But to these considerations this act paid no regard; it sentenced the debtor to an immediate confinement, in which, however solvent, or however honest he might be, he was necessitated for a long time to remain. Nor was the period of his bondage certain. The words of the act are so indefinite, that a quarter of a year might elapse before the delivery of his chattels; and it was necessary for him, by the sale of these and of his lands, to settle afterwards with his creditor. It is unnecessary to point out either the cruelty or the absurdity of this provision, which, instead of being confined to particular districts, as that of the former act, was extended over the whole kingdom. Nor will it be necessary, in this place, to expatiate on the illegality of this law; as in its principle and its operation

ration it coincides with the statute of Acton-Burnel, the observations already made are equally applicable to both.

We have now examined a series of laws, oppressive and unconstitutional; all springing into existence within the short period of nineteen years, without the intervention of one statute in favour of national liberty. Under the dotage of one king, and under the despotism of his successor, the spirit of the people sunk into a torpid inactivity. They tamely suffered the incroachments of the Crown, and groaned in silence under the tyranny of the Aristocracy. Liberty was trampled under foot; the gaols were filled with prisoners; the limbs of the freeman were shackled with irons. It is observable in the history of this country, that there is in the souls of Englishmen a degree of elasticity, by which they naturally fly back to their proper elevation, as soon as the incumbent weight is taken off. We hardly read of oppressions without a subsequent assertion of liberty. But it has unfortunately happened, that the *former*, though sometimes secret and removed from the public view, have been constant in their operations; while the *latter* have only been occasional. We are too apt, upon a declaration of our liberties, to consider the danger we opposed as altogether annihilated, and to sink into the perilous slumber of imaginary security. Hence have arisen the many contradictions which occur to the inspector of our statute law. He there finds the most ample declarations of our natural rights, while he feels the effects of the most destructive oppression. He enjoys in theory the prospect of the purest and most unbounded liberty; but the delusion vanishes when his person is arrested for debt, when his house is ransacked by a revenue officer, or when his property is seized under the warrant of a trading justice. In every case, how-

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ever, where our liberties are secured by positive laws, we have an undoubted right to enjoy them: the usage, however antient, by which they are affected, is bad. No custom, in its principle unjustifiable or illegal, ought either to be respected or adopted; it cannot become venerable by the longest prescription. It behoves us, therefore, as the citizens of a free country, to eradicate such customs as are incompatible with our laws. Of these, the foremost in the list, and the most intolerable in its consequences, is imprisonment for debt. We have seen that it was unknown to the common law; we have seen the manner in which it was introduced. Let us now proceed to the revival of those statutes by which it was annihilated.

A long series of oppressions had so inflamed the minds of the people, that Edward the First, in the year 1297, found himself under a necessity of making some concessions to his subjects, in order to purchase a continuation of their allegiance and submission. For this purpose, at a parliament holden in London, on the 10th of October, he granted a confirmation of the Great Charter, in terms which deserve our consideration †. By this act ‡, two material things are declared: That the Great Charter

† *Parl. Hist. v. I. pag. 118.*

‡ *Edw. I. Stat. c. 1. Confirmatio Cartarum.*

I know ye, says the statute, that we, to the honour of God, and of Holy Church, and to the profit of our realm, have granted for us and our heirs, that the Charter of Liberties—made by common assent of all the realm, in the time of King Henry our father, shall be kept in every point without breach.—And our justices, sheriffs, mayors, and other ministers, which under us have the laws of our land to guide, shall allow the said charter pleaded before them in judgement in all its points, that is to wit, the Great Charter as the common law.

shall be kept in every point without breach; and that it shall be allowed, by all judicial officers, to be pleaded before them in judgement in all its points. By the second chapter of the same statute, it is further declared, That if any judgement be given by any judicial officer contrary to the points of the charter, it shall be undone and holden for nought. These three clauses must either have had no effect at all, or they must virtually have abrogated those laws which had been made in derogation of the Great Charter. When the charter was declared to be in full force, those laws, as contradictory to it, must have ceased to exist. The ingenuity of a casuist may reconcile accidental dissimilitudes; but by no art can two powers, operating in contrary directions, be made to act effectually at the same time. If their forces are equal, the consequence must be mutual inactivity; if unequal, the stronger must prevail.

Excellent however and definitive as these provisions were, a very short experience sufficed to prove that some secret motive prevented them from taking effect. The powerful and the rich are not easily prevailed on to give up a privilege, which gratifies at once their despotism and their avarice; particularly when that privilege appears under a legal disguise. The Hydra cannot be destroyed by a single blow; new heads will continue to arise, until, by some successful stroke, a period is put to its existence.

At a parliament holden at Westminster in the year 1299*, it was suggested, that the reason why the Great Charter had not been observed or kept, was, because there was no punishment executed upon those who offended against it. To remedy this defect, and to insure a future obedience, the legislature applied a remedy, which appears as the statute 28 Edw. I. c. 3.

* Preamble to St. 28 Edw. I. St. 3.

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c. 1 *, and runs in these words: “ From henceforth
 “ the Great Charter of the Liberties of England,
 “ granted to all the commonalty of the realm, shall
 “ be observed, kept, and maintained in every point,
 “ in as ample wise as the King hath granted, re-
 “ newed, and confirmed them by his charter. And
 “ the charter shall be delivered to every sheriff of
 “ England, to be read four times in the year before
 “ the people in the full county.—And for this char-
 “ ter to be firmly observed in every point and article
 “ (where before no remedy was at the common law),
 “ there shall be chosen in every Shire-court, by the
 “ commonalty of the same shire, three substantial
 “ men, knights, or other lawful, wise, and well-
 “ disposed persons, which shall be justices sworn and
 “ assigned by the King’s letters-patents under the
 “ Great seal, to hear and determine (without any
 “ other writ, but only their commission) such complaints
 “ as shall be made upon all those that commit or
 “ offend against any point contained in the foresaid
 “ charters, in the shires where they be assigned, as
 “ well within franchises as without, and as well for
 “ the King’s officers out of their places, as for other;
 “ and to hear the complaints from day to day without
 “ any delay, and to determine them, without allow-
 “ ing the delays which be allowed by the common
 “ law. And the same knights shall have power to
 “ punish all such as shall be attainted of any tres-
 “ pass, done contrary to any point of the foresaid
 “ charter (where no remedy was before by the com-
 “ mon law), as before is said, by imprisonment, or
 “ by ransom, or by amercement, according to the
 “ trespass.” We may observe, that the framers of
 this act, by endeavouring to avoid one evil, fell into
 another, illegal in its nature, and prejudicial in its

* Articuli super Cartas.

execution. A new kind of inquisitorial court was established, which, evading the right of trial by jury, and giving a summary and boundless power to a few great men, tended rather to the oppression of the subject, than to the attainment of the salutary end proposed. We cannot therefore wonder, that very shortly after the grievances of the people again called aloud for redress.

In the very next year, 1300 *, the complaints of the kingdom arose to such a height, that the necessary supplies were denied to the crown, until some sufficient provisions for the permanent security of the people should be made. This cogent method of reasoning produced its natural effect, a compliance with the public demand; and a further charter was granted, more comprehensive and complete than any of those which had been made to confirm the Great Charter. By some unaccountable omission, this most important law does not appear in our statute book; but the public is indebted to the late Mr. Justice Blackstone for a correct copy of it, and for the information that the original is still preserved in the Bodleian Library. It runs in the following words: “*Edwardus Dei gratiâ Rex Anglie Dominus Hibernie et Dux Aquitannie omnibus ad quos presentes literę pervenerint salutem. Sciatis quod cum nos magnam cartam domini Henrici quondam Regis Anglie patris nostri de libertatibus Anglie una cum Carta de Foresta concesserimus & confirmaverimus ac innovaverimus per Cartam nostram preceperimusque quod cartę ille in singulis suis articulis teneantur et firmiter observentur: volumus et concedimus pro nobis et heredibus nostris quod si quę statuta fuerint contraria dictis cartis vel alicui articulo in eisdem cartis contento ea de communi*

* Parl. Hist. v. I. p. 132.

“*consilio*

“ consilio regni nostri modo debito emendentur vel
 “ etiam annullentur. In cujus rei testimonium has
 “ literas nostras fieri fecimus patentes. Teste meipso
 “ apud Lincolniam quartodecimo die Februarii An-
 “ no regni nostri vicefimo nono *.” Whatever glosses
 or false interpretations the ingenuity of interested per-
 sons might have put upon the preceding charters of
 confirmation, we can hardly suppose the wit of man
 to be capable of understanding this in a sense, dif-
 ferent from that which the common meaning of the
 words conveys. It contains two brief concessions :
 that the Great Charter shall be firmly held and ob-
 served ; and that whatever statutes, contradictory to
 it, or to any article contained in it, had been made,
 should be duly emended, or should even be annulled.
 The nation, therefore, was now doubly secure from
 the oppressive laws under which it had for some time
 laboured. Although it would seem that, by the re-
 peated confirmations of Magna Charta, these laws
 were in fact repealed ; yet, to obviate every doubt,
 they were in this instrument expressly and positively
 annulled. And indeed no other interpretation can
 be adopted by any reasonable man, whether conver-
 sant with legal constructions, or not. Mr. Justice
 Blackstone † was so entirely satisfied on this head,
 that he even goes a step beyond his usual precision,
 and pronounces this charter to be the final and com-
 plete establishment, the lasting settlement, of the two
 charters, of liberties, and of the forest ; that by
 this, they were now fixed upon an eternal basis.
 Though he is perfectly right in his theory, he is un-
 doubtedly mistaken in point of fact. The words of
 this charter, simple and evident as they may appear,

* Carta Confirmationis Regis Edw. I. 14 die Feb. A. D.
 1300. A. R. 29.

† Blackst. Introd.

met with the common fate of its predecessors. By a dexterous use of the optional clause at the conclusion of it, a door was opened to future oppressions; which arose to such a magnitude, that, in a very few years afterwards, it again became necessary for the legislature to erect a more perfect and durable fence, which neither the interests nor the passions of mankind should overleap. This was accordingly done by the statute 34 Edw. I. st. 4. c. 4. in these terms * :

“ We will and grant for us and our heirs, That all
 “ clerks and laymen of our land shall have their
 “ laws, liberties, and free customs, as largely and
 “ wholly as they have used to have the same at any
 “ time when they had them best. And if any sta-
 “ tutes have been made by us or our ancestors, or
 “ any customs brought in contrary to them, or any
 “ manner of article contained in this present charter,
 “ we will and grant, that such manner of statute and
 “ customs shall be void and frustrate for evermore.”

To argue on a plain matter of fact, will be to consume unnecessarily the time and the patience of the reader. The statute speaks for itself. Did it want an additional explanation, that great oracle of the law, Sir Edward Coke, would give one †. This act, he says, contains a general restitution to the subjects of all their laws, liberties, and free customs, as freely and wholly as at any time before, in the best and fullest manner, they used to have the same. And it does not only extend to Magna Charta and Charta de Foresta, but to all other laws, liberties, or free customs whatever; for the latter clause of the act contains a repeal of all statutes made by King Edward I. or by any of his ancestors, against any article in this act contained. Hereby, continues he, it may

* Statutum de Tallagio non concedendo.

† 2 Inst. 535.

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be observed, how prudent antiquity could contain much matter in few words.

Here then, for the present, let us rest the question, and be allowed to assume what appears to be an obvious conclusion, that the several statutes prescribing, in certain cases, imprisonment for debt, as being derogatory from Magna Charta, and subversive of the laws, liberties, and free-customs of the nation, were effectually repealed and annulled. Is this disputed? If it be not, then it must of course be allowed, that the practice, founded solely upon those statutes, could subsist, legally, no longer than the statutes themselves continued in existence.

C H A P. IV.

HAVING thus arrived at the period, when the practice of imprisonment for debt lost even that shadow of support, which it derived from laws in their nature unconstitutional; when the rights of Englishmen were recognized, and their laws, their liberties, and their free-customs were, in the most solemn and determinate manner, acknowledged and confirmed; we now proceed to consider those steps, which in subsequent reigns were taken, either to confirm, or to invade, the liberties of the subject.

The reign of Edward the Second affords us but one statute declaratory of the national liberty. Indeed, after such repeated and formal avowals, it appears strange that any additional sanction should have been deemed necessary. But the people seem to have been jealous of their rulers, and to have been desirous of imprinting on their minds, by these occasional confirmations, a just sense of the importance of the Great Charter. The statute in question is the 2 Edward II. By this the king, after reciting the Articuli super Cartas, 28 Edward I. st. 3. declares his will and command, that these articles shall for the future be fully kept and observed in all their points. We must however take notice, to the honour of this unhappy monarch, that, during the course of his reign, the statute book is not contaminated by any act invasive of liberty.

The reign of his successor affords us a very different prospect, by the multitude of contradictory statutes which it presents. It is extraordinary that so

little precision should have been used. Where a number of opposite and irreconcilable laws are made, justice is at a stand, and oppression flourishes. But it is a common error of legislators to frame laws upon the impulse of the moment. When this happens, original principles are disregarded, and consequences are not considered. Ought we then to be surprized that inconveniences ensue?

Within the first five years of King Edward III. the Great Charter was four times confirmed, and directed to be exactly observed in all its points. In spite of these precautions, incroachments are still made upon the helpless, by those whose situation enabled them to evade, or to defeat, the operation of the law. The oppressions under which the people laboured, as well as the causes of those oppressions, were too palpable to escape the notice of the legislature. To put a stop to them, the statute, 10 Edward III. st. 1. c. 1. was framed; which enacts, That the Great Charter, and the several statutes made in the time of this king, and of his progenitors, shall be kept, holden, and firmly maintained, as well by the great men as by the small, by the rich men as by the poor. Within four years after, the Great Charter was again confirmed.

In spite of all these precautions, fresh grievances still arose, sufficient to convince any legislature, which proceeded on fixed and regular principles, that, however strongly the best and most salutary laws may be enforced, bad men will still proceed in their iniquity, so long as the contradiction of the national code affords them a colourable pretence to justify their conduct. The parliament, indeed, appeared in earnest

* 1 Edw. III. Statute 1. ribz Edw. III. c. 1. 4 Edw. III. c. 1. And 5 Edw. III. c. 1. † 14 Edw. III. St. 1. c. 1. §. 2.

in their endeavour to extirpate these crying enormities; but while the statutes which gave them birth were suffered to continue in execution, their business was but half done. It certainly, however, must have been the intention of the legislature to put an end to this abuse: for the phraseology of the statute, 25 Edward III. ft. 5. c. 4. which was made on this occasion, established in the firmest manner the common liberty; and in theory, whatever might be the case in practice, the several violences complained of were effectually abolished. The statute itself is so plain and so forcible, that it will be sufficient to leave it to the reader, without further observation. It is couched in these terms: "Whereas it is contained in the Great Charter of the Franchises of England, that none shall be imprisoned nor put out of his freehold, nor of his franchise, nor free-custom, unless it be by the law of the land; it is accorded, assented, and established, that from henceforth none shall be taken by petition or suggestion made to our Lord the King, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done, in due manner, or by process made by writ original at the common law; nor that none be out of his franchises, nor of his freeholds, unless he be duly brought in to answer, and forejudged of the same by the course of the law: And if any thing be done against the same, it shall be redressed and holden for none."—Conformably with this law, which still exists in full force, what man can be imprisoned for debt? The rule of the common law is laid down as the only guide to be followed: it is solemnly declared, that every imprisonment, not justified by, or contrary to, that invaluable code, shall be redressed and annulled.

The frequent repetition of these confirmations is a proof that various attacks had been made by individuals

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dividuals upon the liberties of their fellow subjects ; but it is also a proof, that the Great Charter was considered by the legislature as a code of the highest and most important nature. During forty-five years, which had elapsed since its final confirmation by the 34 Edward I. c. 4. no attempt had been made in parliament to diminish its authority, or to impede its operation. Why such an attempt was now made, or by whom it was suggested, we cannot, at this distant period, pretend to ascertain. It will be sufficient for us to examine it coolly and impartially, uninfluenced by those interests and that precipitation, by which probably the framers of it were actuated.

By the statute 25 Edward III. st. 5. c. 17. it was enacted, “ That such process shall be made in a writ of debt and detainue of chattels, and taking of beasts “ by writ of *capias*, and by process of exigent by “ the sheriffs return, as is used in a writ of *accompt*.” There are probably few instances of such glaring inattention in the formation of an act of parliament, as the statute now before us exhibits. The two accountant acts, as we have seen, were entirely distinct in their operations ; by the former, the process of *capias* had been given ; by the latter, the process of exigent ; either of them might have been pursued at the option of the creditor ; but it clearly appears, that, in a writ of *accompt*, both together could not. The legislature, therefore, was inconsistent in directing both these processes to be used, as in a writ of *accompt* ; for upon this writ no process of exigent could have been maintained. By this act, however, the creditor was authorized to use them both ; and was thus invested, at least as much as the intention of the law-givers could invest him, with a power over the body of his debtor superior to that which the former oppressive statute had conferred. It follows, that if that law was arbitrary and illegal, this was

was still more so, and tended in a still greater degree to affect the common liberty. Its operation therefore (supposing it to have any) was highly dangerous and unconstitutional, as it sacrificed the welfare of the community to the private interests of a few; a maxim reprobated as well by the politician as by the lawyer. For it is an acknowledged truth, that, both in law and in government, a private injury should be suffered rather than a public evil. But, in fact, this incroaching statute could have no operation at all. It does not simply and plainly say, that in a writ of debt process of *capias* or *exigent* may be used; but it qualifies the precept, by directing such process of *capias* and *exigent* to be used as is used in a writ of *acompt*. As acts, invasive of a natural right, are to be construed strictly, this qualification must be attended to. Without insisting further, then, on the mistake of the legislature already noticed, and supposing the process meant to be given to be the same as that formerly directed by the two accountant acts, we may fairly contend, that such process as by two accountant acts might have been pursued, and no other, was directed by this. But we have already seen that the two accountant acts could give no process; they no longer existed: they were both repealed. The qualification, therefore, reduces the operation of this act to a nullity. It may be objected, that, notwithstanding the acts of the 29th and the 34th of Edward the First, the two accountant acts still continued to operate, and that, therefore, the qualification in the present act had a good foundation. To this it may be answered, that however the power of individuals, or the corruption of courts of justice, might support the execution of these laws, they were absolutely annulled by those subsequent statutes, which, in the most direct and pointed terms, repealed every act invasive of liberty,

or contradictory to the Great Charter. As those acts therefore had no legal existence, this act, thus qualified, could have no foundation: the judges were not justifiable in awarding process upon it; much less are our judges at this day to be justified, in permitting thousands of their free-born fellow subjects to be imprisoned by a process grounded solely on this phantom of a law. In its formation it was unconstitutional; it had no operation, for that which it assumed was founded on a non-existing law, and, as we shall speedily shew, it has since been repealed.

Another argument in disfavour of this law may be brought from a statute made within two years after it. This was the statute de Stapulis, passed in the 27th year of Edward the Third *. By this the Staple was removed from Calais, and fixed in several towns in England. Various rules were laid down for its regulation: among others, a process for the acknowledgement of debts due to the merchants, similar to that formerly mentioned, was provided. When the debtor had duly entered into a recognizance, and when the day of payment was elapsed, a power was given to the mayor of the Staple to imprison the body of the debtor, and to keep him in confinement until he should discharge the debt and costs. Afterwards, the goods of the debtor, found within the Staple, were to be seized, and to be delivered to the creditor on a fair valuation; or else they were to be sold for the best price, and the money arising therefrom was to be delivered to the creditor, to the amount of the debt, or so much of it as it was competent to discharge. Although this statute bore extremely hard on the debtor, it will be unnecessary in this place to expatiate on its severity; the reasoning which occurred on the statute of merchants being

* 27 Edw. III. St. 2. c. 9,

equally applicable to this. It is, however, highly necessary to observe, that if the legislature had been desirous to stigmatize the preceding law, which gave the process of *capias* and *exigent* in a writ of debt, it could not more effectually have done it than by passing this act. Supposing the former statute to have had an operation, it must have taken effect in all cases where a writ of debt would lie; this writ could clearly be brought upon a settled account, where the sum in question was ascertained; but, in a recognizance acknowledged in the Staple, the account was settled, and the sum liquidated: upon such a recognizance, therefore, a writ of debt would lie. An ample remedy was thus provided: what occasion then was there for a second law, which gave no new remedy, but merely repeated the process of the former? Either the former law had no operation, or it was absurd to make this new regulation. If it shall be said, that the statute *de Stapulis* was a partial law, and operated only in those particular places where the Staple was fixed, the case will not be much mended. The process given in a writ of debt was general, and operated equally throughout the whole kingdom, in the Staple towns, as well as elsewhere. The conclusion must therefore be, that, if the statute 25 Edward III. had an operation, this was unnecessary; if a necessity was found for enacting this law, the former must have been deemed altogether inefficacious.

The evident contradictions between these acts and the Great Charter would almost induce a belief, that the legislature must have considered this sacred code as little more than a dead letter, bereaved of all activity, and forgotten by the nation. In whatever way we consider it, the impossibility of their operating at the same time must be apparent. Their spirit and their effect are as opposite as freedom is to sla-

very, as justice is to oppression. But we are taught, by the history of this reign, how easily the wisest men may be led into absurdity and error, when they lose sight of the great principles by which, as legislators, they should be directed. The few indeed may be benefited, and may approve; but the majority of the people will curse the innovating hand, which, to cure a slight and partial evil, inflicts a mortal wound on the vitals of the constitution. Where the law is unfixed, where the great landmarks of our freedom are wantonly sported with, the liberties of the people totter on an unstable basis. For that care and perseverance with which our ancestors asserted them, we should deservedly be grateful; but it might perhaps be better, that that care and that perseverance had not been exerted, than that we should at this day be insulted with the empty show of those liberties, which, while we are envied for them by the rest of the world, we are conscious that we do not, that we cannot, enjoy.

Notwithstanding their evident contradiction, it appears that the legislature did consider these clashing laws as capable of a concurrent existence. It continued to reverence and to enforce the Great Charter, although it had so materially affected, and even undermined, its most essential clause. Within eleven years after the statute de Stapulis was passed, the Great Charter was five times positively confirmed*. Each of these confirmations was, in effect, a repeal of all laws made in derogation from it. But the charter was held to be confirmed in every point, and these laws were still allowed to operate; a mode of reasoning which we should hardly suppose to have been adopted, did not our daily experience convince

* 28 Edw. III. c. 1. 31 Edw. III. St. 1. c. 1. 36 Edw. III. St. 1. c. 1. 37 Edw. III. c. 1. 38 Edw. III. St. 1. c. 1.

us that it is still adopted and enforced by our courts of justice.

We meet with a petition on the Parliament Roll, 36 Edward III. Num^o 9^o. which, together with the King's answer, would be sufficient, were there no other authorities, to prove the illegality of this practice. It is in French, but runs thus in a translation: "First, that the Great Charter, and the charter of the forest, and the other statutes made in his time, and in the time of his progenitors, for the profit of him and his commonalty, be well and firmly kept, and put in due execution, without putting disturbance or making arrest, contrary to them, by special command, or in other manner." The answer to the petition, which makes it an act of parliament, is, "Our Lord the King, by assent of the prelates, dukes, earls, barons, and the commonalty, hath ordained and established, that the said charters and statutes be held and put in execution, according to the said petition." It is observable, that the statutes were to be put in execution according to the said petition; which is, that no arrest shall be made contrary to the statutes. This concludes the question; and is of as great force as if it were printed; for the Parliament Roll is the true warrant of an act.

Another very excellent law was soon after made, which appears as the statute 37 Edward III. c. 18. From this we learn, that although by the Great Charter no man could be taken, or be imprisoned, or be ejected from his free-tenement, without due process of law; yet that many persons had, whether from malice or otherwise, made false suggestions to the King, to the great danger and detriment of many of his subjects. To put a stop to this practice, it was ordained, that such suggesters should be sent before the chancellor, treasurer, and great council;

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there to give surety for the due pursuit of their charge. If they failed in making out their suggestions, they were to undergo the same punishment which the accused person would have suffered, had he been found guilty. But the process against the accused was to be carried on without arrest or imprisonment; both of which this act affirms to be contrary to the Great Charter and to other statutes. This is no ambiguous declaration of the sentiments entertained by the legislature, on the subject of imprisonment. It were to be wished that such had always been the language of parliament. We should not then have such frequent occasion to lament the inconsistency of our statute law, or to shudder at the miseries of our injured fellow-subjects.

The operation of this good law was enforced and extended by the statutes 38 Edward III. st. 1. c. 9. and 42 Edward III. c. 3. By this latter act it was declared, that no man shall be put to answer without presentment before justices, or by matter of record, or by due process and original writ, according to the old law of the land; and that, if any thing from thenceforth should be done to the contrary, it should be void in law, and holden for error. Within the same period, another law was framed, which highly deserves our attention; the statute 28 Edward III. c. 3. which enacts, "That no man, of what state
" or condition that he be, shall be put out of land
" or tenement, nor taken, nor imprisoned, nor dis-
" inherited, nor put to death, without being brought
" in answer by due process of the law." The high respect, so deservedly entertained for the veracity of parliament, has induced a maxim, that an act of parliament cannot be false. We must not dare to imagine that this venerable assembly can assert fictitious grievances, or ordain provisions where no necessity for its interference appears. Guiding our ob-
servations

servations by this rule, we are warranted to say, that, notwithstanding the constant jealousy entertained for the conservation of the Great Charter, many and crying enormities had arisen, and the rights of the people had been grievously affected. The lands and tenements of the freeman had been taken from him; he had been arrested; he had been imprisoned; he had been put to death. And he had suffered all these calamities, not by the judgement of his equals, or by the law of his country, but by the tyranny of those who were more powerful than himself, countenanced and supported by the dangerous institution of a summary and illegal process. To these grievances the parliament applied a remedy; it ordained, that, before any man should be thus affected, he should know his accusation, that he should be allowed to answer it, and that all the proceedings against him should be regulated by the due process of the law; that is, by such process as the Great Charter had directed in confirmation of the common law. Would to God that some such wise and benevolent spirit would actuate our present legislators, to apply a remedy to those enormities which now affect our constitutional rights! The undertaking is worthy of those many excellent men who now adorn our senate. The consciousness of doing good would be the reward of their labours; and their virtues would be wasted to heaven, in the prayers and the thanksgivings of thousands.

We meet with a further proof of the excesses to which these oppressive and unconstitutional laws had given birth, in a statute passed in the 38th year of this king*. No sooner was the summary process in cases of debt permitted to usurp on the rights of the common law, than an use was made of it, replete in-

* 38 Edw. III. St. 1. c. 5.

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deed with mischief, yet such as the framers of that incroaching statute might have foreseen. It was an instrument adapted to the purposes of oppression; the interested hand of avarice or of revenge was sufficient to direct its impulse; and its course was quickly marked by distress and ruin. As soon as the suggestion of the creditor became sufficient to warrant the imprisonment of the debtor, a ready opportunity was afforded to the worthless and abandoned, of gratifying their malice, or of satisfying their cupidity. To such breasts the crime of perjury is no otherwise terrible, than as the discovery of it may be attended with punishment. But where the proposed advantage is immediate, this consideration is often disregarded; and where the advantage is great, the comparative smallness of the punishment is often apt to tempt to the commission of the crime. We accordingly find, that, within a few years after this summary process was allowed in a writ of debt, great complaints arose in the city of London of the abuse of this permission. "Many people," says the preamble to the above-mentioned act, "are grieved and attached by their body in the city of London, at the suit of the people of the same city, surmising to them that they be debtors, and that they will prove by their papers; whereas they have no deed nor tally." Here we see the beginning of that scandalous abuse, which has since enormously increased, and which is now arrived to a pitch, the most alarming and destructive. Where the oath of the interested party is deemed a sufficient ground to warrant an arrest, the honest and the solvent are no longer in security. It is equally easy to swear to a large, as it is to a small sum; and the demand may be increased to such a magnitude, as to make it impossible for the victim to escape a commitment. The truth will indeed at length be brought
to

to light; but the injured citizen will have endured the horrors of a gaol, his credit may have been blasted, and all his fairest hopes of happiness and of fortune may have been cut off. It required no extraordinary portion of sagacity to foresee these inconveniencies. When they were foreseen, but one effectual remedy could occur. So long as the cause remained, the consequences would follow. It behoved the legislature to restore to the common law its former force, and to eradicate from the soil of the constitution that novel and accursed plant, from which no other fruits could be expected than mischief and iniquity. But to the temporizing policy of that age, such decided conduct was rarely known. The immediate grievance received its immediate remedy *; and to another parliament was left the care of curing those disorders which in after-times might arise.

Nor was it long before disorders did arise. Those partial and ill-digested statutes did not in a less degree affect the happiness of the people, than they undermined their constitutional rights. The general oppression of the subject called aloud for redress; and the legislature was at length convinced, that nothing but the most decided conduct could restore the constitution, which, by such a concurrence of attacks, was hastening to its dissolution. Palliatives had been tried; they had been found unsuccessful. Nothing remained but to root out the cause of the disorder; to save the body, by amputating the part diseased. In order to effect so laudable a purpose, the parliament, which assembled in the year 1368, took this important business into consideration. The grievances of the people were reducible under two heads; the disregard shewn to the Great Charter, and the various statutes which had been made in de-

* 38 Edw. III. St. 1. c. 5.

rogation from it. By the former, they were tantalized with a shew of liberty, which they could not reach, and from the enjoyment of which they were precluded; by the latter, they lost the privilege of trials by jury, and suffered the miseries of bond-men. Fortunately for the cause of reason and of human nature, the voice of truth found its way at length to the ears of our legislators. They took a decided part; and that part was in favour of the national rights. "Let the Great Charter," they said, "be holden and kept in all points; and if any statute be made to the contrary, that shall be holden for none *."

That this act was a complete restitution of those liberties which the Great Charter contained, and an absolute repeal of the intermediate statutes by which those liberties had been affected, is a point too clear to admit of an argument. Lord Coke †, in his exposition of the 26th chapter of Magna Charta, expressly affirms it. The writ *de odio & atia*, he says, which had been given by that charter, was taken away by the statute 28 Edward III. c. 9. because, as some pretended, it had become unnecessary; but as soon as the statute 42 Edward III. c. 1. was enacted, these writs were revived; and so, continues he, in like cases upon all branches of Magna Charta; for by that act all statutes made against Magna Charta are repealed ‡.

To add aught to the testimony of so great and so wise a man, were unnecessary as well as presumptuous. A doctrine which has never been denied, wants not the support of argument.

After a detail of arbitrary and unconstitutional laws, which, during a period of above sixty years, had been undermining the liberties of his fellow sub-

* 42 Edw. III. c. 1.

† 2 Inst. 43.

‡ 2 Inst. 55.

jects, it must gratify the feeling and ingenuous reader to arrive at a period, when an end was put to these vexations, when the scourge of oppression was no longer suffered to prevail. The Great Charter was confirmed, and every statute which impeached it was repealed. That mass of inconsistency, which so long had disgraced our code, was annihilated. To the captive was stretched forth the hand of humanity; the fabrick of slavery was thrown from its foundation, and the genius of liberty stood triumphant on its ruin.

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C H A P. V.

THE solemn declaration of the rights of the people, which we have just considered, the formal disavowal of an assumed illegal power, the full repeal of the laws inimical to the common liberty, made too strong an impression, either suddenly to be forgotten, or suddenly to be contradicted with impunity. For a while, the natural rights of English citizens shone unobscured by the clouds of private interest or personal malevolence. The legislature no longer heard the voice of complaint, nor felt the necessity of exerting its interference, to save the suffering individual from the vengeance and oppression of his fellow creature. The complete confirmation of the Great Charter, and the restitution of the unadulterated common law, had, at the time to which we are now arrived, as far as human prudence could foresee, put the liberties of the people on a secure basis.

Before we proceed in a continuation of our historical deduction, it will be proper to premise one general principle, on which the whole of the succeeding argument must depend. The act of the 42nd of Edward III. c. 1. as we have proved, completely restored the Great Charter and the common law, and annulled every statute which had been made derogatory from it. The system of imprisonment for debt, therefore, at the same moment, lost every shadow of legality. It fell with those laws which had given it birth. But the practice was too general, it had become too familiar to the courts of justice, so easily to be exterminated. Its roots had indeed been
torn

torn up ; the lofty tree had been cast down : but its branches still continued to flourish ; it still blossomed with oppression ; still bore the fruits of destruction. We must not, therefore, be surprized to find, that, though in a legal sense the system was overturned, the practice itself continued in use. Extraordinary as this may appear, it is a phenomenon by no means uncommon in this country. The experience of the lawyer and of the historian will afford frequent instances of contradictions, altogether as extraordinary, and as opposite to reason. The cases of General Warrants, of impressing soldiers and mariners, of the present extended jurisdiction of the Courts in Westminster Hall, and of the Marshalsea Court, are all equally in point. That they are unconstitutional, that they are invasive both of the common and of the statute law, may without much difficulty be proved ; but it is equally certain, that they are all in use, sometimes for the benefit, not unfrequently to the detriment, of society. It is however indisputable, that, in a country which boasts of its constitution and its laws, such practices are highly unwarrantable. They break down the fence between right and wrong ; they confound the ideas of justice, and introduce an ignorant contempt for the settled principles of our government. If the present system is faulty, if it is inadequate to protect the virtuous and to curb the bad, let it be altered. The legislative body of the nation is ever ready to hear the complaint, and to administer relief. But let not an individual, or any particular order of men, presume to introduce or to maintain a custom unauthorized by law ; let them not dare to administer injustice, where they are appointed to minister justice ; let them not sacrifice to prejudice and oppression the pure and benevolent laws of their country. Hence, added to the little knowledge and still less precision of those

earlier

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earlier times, have arisen the magnitude and continuance of that illegal custom, against which these pages bear testimony. *Hoc fonte derivata clades in patriam populumque fluxit.* No law remained to justify the practice; but the practice itself became more forcible and more general than any law. The courts of justice, which ought to have opposed the torrent, favoured and directed its course; the grave and learned guardians of the law submitted their better judgements to the opinions and the passions of the multitude. Let us therefore constantly keep in mind this observation; let us proceed in our pursuit, with this truth ever in view, that a general custom does not necessarily imply an existing law; that although the practice of imprisonment for debt prevails, though it is countenanced openly by the judges, and tacitly by the legislature, if no law exists to warrant it, it must be illegal.

Conformably with this reasoning, we find ourselves warranted to assert, that, from the 42d year of Edward III. to the 19th year of Henry VII. a period of 135 years, the law of insolvency, and the personal liberty of the subject, continued on the same footing on which they had been left by the final confirmation of the Great Charter. To whatever the advocates for imprisonment for debt may alledge of the continuance of the practice during this period, an answer has already been given. Customs may exist which are contrary to law; their generality is no proof of their legality; it only shews the tameness or the ignorance of the people, and the iniquity of those delegated to watch over their safety. We have a much broader and a much more certain ground of argument. We have shewn how this custom originated, and how it fell. From the same authority, the statutes of the realm, the most sacred and the least disputable of all records, we proceed to prove,
that,

that, during all these years, this custom received no additional sanction.

The first act of parliament which we meet with relating to this subject, is the 1 Richard II. c. 12. The preamble to this act is very full, and contains the reasons which were deemed sufficient to justify the interference of the legislature. We there find that a custom had arisen, by which many persons, committed at the suit of their adversaries to the prison of the Fleet, *by judgement given in the King's courts*, were oftentimes suffered to go at large by the warden of the prison, sometimes by mainprize or by bail, and sometimes without any mainprize, with a baston of the Fleet, and were permitted to go thence into the country about their merchandizes and other business, and to continue long there night and day out of prison, without the assent and allowance of those, at whose suit they were so adjudged to prison; by which, as it was alledged, a man could not come to his right, or recover against such prisoners, to the great mischief and undoing of many people. This practice was therefore reprobated; and the warden was strictly prohibited from permitting it in future to be exercised, under very severe penalties.

Notwithstanding this law, we find that the grievance still continued, by the necessity under which the legislature found itself, in the succeeding reign, to pass a new statute confirmatory of the preceding. This was the statute 7 Henry IV. c. 4. which strictly prohibits debtors, *condemned to their creditors by due process of law and committed to prison*, from being permitted to go abroad.

The next statute relating to this subject is the 2 Henry V. ft. 1. c. 2. It was made to restrain an abuse of the writ of habeas corpus, as the framers of this statute are pleased to term it. Whether it merited

merited so severe an appellation, the reader on due consideration will best determine. We cannot consider it more fairly than by appealing to the statute itself, for the reasons which were deemed deserving of so forcible an interference, and for the regulation which was grounded upon them. It runs thus—

“ Forasmuch as *many men have been condemned in the*
 “ *courts of our Lord the King*, and in the courts of
 “ his progenitors, as well within the city of London,
 “ as in other cities and boroughs within the realm
 “ of England, and *by virtue of such condemnations*
 “ *have been committed to the prison* of our Lord the
 “ King, there to remain until they have made agree-
 “ ment to the plaintiffs to whom they were con-
 “ demned; after, by their suggestion made in the
 “ Chancery of our Lord the King, they have had
 “ divers writs, called Certiorari, and Corpus cum
 “ causa, out of the Chancery of our said Lord the
 “ King, directed to the sheriff, or keepers of the
 “ prisons where such persons condemned be holden,
 “ to have their bodies, with the cause of imprison-
 “ ment of the condemned aforesaid, in the Chancery,
 “ at the days contained in the said writs: after
 “ which writs, together with the body, and the
 “ cause of condemnation, returned in the Chancery
 “ aforesaid, *the said persons so condemned have been*
 “ *delivered in the Chancery* aforesaid by bail or by
 “ mainprize, or enlarged without bail or mainprize,
 “ against the assent and will of the said plaintiffs,
 “ and without any agreement made to the said plain-
 “ tiffs of the sums in the which they be condemned,
 “ *against the law of the land*: and so remain the said
 “ plaintiffs without remedy, in hindrance of the
 “ state of such plaintiffs, and in defeating of the
 “ judgements given in the courts aforesaid: Our
 “ Lord the King, willing herein to provide remedy,
 “ by the advice and assent, and at the request of the
 “ Commons,

“ Commons, hath ordained and established, That if
 “ any such writ of Certiorari, or Corpus cum causa,
 “ be granted, or shall be granted at any time here-
 “ after, and upon the said writ if it be returned,
 “ *that the prisoner which is so bolden in prison is con-*
 “ *demned by judgment given against him, that presently*
 “ *he shall be remanded, where he shall remain continu-*
 “ *ally in prison according to the law and custom of the*
 “ *land, without being let to go by bail, or by main-*
 “ *prize, against the will of the said plaintiffs, until*
 “ *agreement be made to them of the sums so ad-*
 “ *judged.*”

Notwithstanding the high authority by which we
 are told, that the deliverance of such prisoners by the
 Court of Chancery, on the return of the writ, was
 against the law of the land, we shall take the liberty
 to dispute the fact, and to assert, that such proceeding
 was strictly legal, and conformable to the rules of
 the common law, and to the antient usage of the king-
 dom. Whether or not it be true, that, in the eye
 of reason, imprisonment of the body, after judgement,
 in some certain cases may be proper, yet it must be
 remembered, that the law of the land was directly
 otherwise. By that the body was in all cases to be
 free from an arrest for debt. An impeachment,
 therefore, of that freedom was a grievance; as such
 it was intitled to the interference of the national
 justice for redress. The proper mode of obtaining
 this redress had been pointed out by the statute
 36 Edward III. st. 1, c. 9. by which it was declared,
 that if any man, who feeleth him aggrieved contrary
 to any statute, will come, by himself or his attorney,
 into the Chancery, and thereof make his complaint,
 he shall presently have remedy (that is, by original
 writ) without elsewhere pursuing to have remedy,
 Even before this act, in all cases of undue imprison-
 ment, the party complaining was intitled, of common
 F right,

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right, to his writ of Habeas Corpus, upon which the gaoler was obliged to return by whom he was committed, and for what cause; if, upon this return, it appeared that his imprisonment was just and lawful, he was to be remanded; but if it appeared to the court that he was imprisoned against the law of the land, the court was bound, by force of the twenty-ninth chapter of Magna Charta, to deliver him; or, if it were doubtful and under consideration, to admit him to bail *. And this doctrine was confirmed by the resolution of all the judges of England, in their answers to the 21st and 22d articles of the Articuli Cleri, in the ninth year of Edward the Second. In the case of excommunicated persons, they affirm, that, if the party be imprisoned, they ought, on complaint, to send the King's writ for the body and the cause: and if on the return no cause, or no sufficient cause appear, they then (as they ought) set him at liberty; for, continued they, if we see not a just cause of the party's imprisonment, then we ought, and are bound by oath, to deliver him. It must therefore follow, that the charge contained in this act against the Court of Chancery, of having illegally released or bailed prisoners on the return of the Habeas Corpus, was groundless. That high tribunal, unfettered by the prejudices which actuated the courts of law, and uninfluenced by that anxiety to extend its jurisdiction by which they have ever been misled, was guided solely by the rules of justice and by the laws of the land. It was conscious, that the practice of imprisonment for debt, even after a judgement, was contrary to those laws; a solemn appeal was made to it from the tyranny of the oppressor; it acknowledged the validity of the claim, and restored the citizen to his liberty, and to the enjoyment

* 2 Inst. 55.

of his rights. After having ascertained this point, we shall hardly be at a loss to determine on the propriety of the regulation introduced by this statute, or on the reason assigned for it. If the practice of imprisonment for debt was not warranted by law, if the Court of Chancery did right, in releasing the prisoner against whom, on the return of the Habeas Corpus, no just or legal cause of imprisonment appeared, how can we justify the statute which declares, that the prisoner brought up on such Habeas Corpus shall be remanded, and shall remain in prison according to the law and custom of the land?

These three are the only laws, relating to this subject, which received the sanction of the legislature during the above period. It may perhaps be objected, that they tend to prove the reverse of what we have all along laid down, as the framers of these laws have evidently founded their regulations, upon the presumption that such imprisonment was usual and justifiable. Admitting this fact to be true, does such consequence necessarily follow? It has not been disputed, that the practice of imprisonment for debt continued; but it has been contended, that such practice was unwarranted by any legal authority. The presumption of the legislature, however strongly it may appear, does not amount to a declaration of the legality of a custom. It never was held, it never seriously can be held, that where the common law is positive and explicit, it can be overturned and rendered of no effect, by the mere implication of the legislature, without a single enacting clause. This presumption, therefore, proves nothing more than that, notwithstanding the restoration of the common law and the Great Charter, the subjects of this kingdom remained exposed to imprisonment after judgement; that the parliament knew the fact, but did not interfere for their relief.

By the relation which all these acts bear to imprisonment after judgment only, it clearly appears that no other imprisonment was then in use. Had it then been the practice to arrest on *Mefne* process, the legislature would doubtless have used a different mode of expression. The phrase would either have been general, or would have specified the one as well as the other; for both were equally within the spirit of these acts, and of the intention by which the framers of them were actuated. It cannot therefore be disputed, that although imprisonment after judgement was then in use, it was not justified by law; and that imprisonment on *Mefne* process was, at that time, not only conceived to be illegal, but was also as great a stranger to the practice, as it was to the laws of this country.

C H A P. VI.

SUCH was the situation of Insolvency in this country in the year 1414; such it continued to be until the beginning of the sixteenth century. It appears from what has been said, that, after the formal repeal of those acts which had invaded the common law process in the year 1368, that process resumed its original force. It must as readily be admitted, that, unless some positive law has since been made to restrain or to alter it, the same process must still continue, and must, at this day, be the only legal mode, by which creditors may proceed against their debtors.

The advocates for the practice of imprisonment for debt may perhaps readily meet us on this ground. They will produce their boasted statute, the 19th of Henry VII. c. 9. They will insist, that by this a sanction was given to their favourite custom, which no succeeding parliament has removed. Let us peruse this law; let us dispassionately consider, whether the imprisonment of so many thousand citizens of a free country can be justified upon its authority.

The act in question runs thus : —“ Forasmuch as
 “ before this time there hath been great delays in
 “ Actions of the Case, that hath been sued before the
 “ King in his bench, as in his court of the common
 “ bench; because of which delays, many persons
 “ have been put from their remedy: Be it therefore
 “ ordained, enacted, and established by the King our
 “ Sovereign Lord, by the advice and assent of the
 “ Lords Spiritual and Temporal, and the Commons
 “ in this present Parliament assembled, and by au-
 “ thority

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“thority of the same, *That like process be had here-
“after in actions upon the case, as well sued and hang-
“ing, as to be sued, in any of the said courts, as in
“actions of trespass or debt.”*

The antient common law, which was guided in all its operations by a careful regard to original principles, made a wide distinction between a Wrong Committed and a Right Withheld. As the guardian of the general peace of the kingdom, it abhorred every species of violence, and subjected the bodies of all such as committed any act of force to imprisonment; which was considered as the highest execution, being a deprivation of the liberty of the offender, until he should agree with the offended party, and pay a fine to the King *. In pursuance of this reasoning, it became a rule of law, that in all actions *Quare vi & armis*, that is, in all cases of violence, a writ of *capias* lay against the defendant, by which his body became liable to arrest and imprisonment; and in all such actions where a *capias* lay in process, there, after judgement, a writ of *capias ad satisfaciendum* lay, and there the King had a writ of *capias pro fine*. The reason of this regulation is evident. It is in the power of every man to behave like an orderly and good subject; it is his duty to abstain from injuring or oppressing his neighbour. So evident is the law of nature, so distinctly is it imprinted on the heart of every individual, that even the weakest and most uninstructed cannot plead an ignorance of its precepts. It can very rarely happen, that a man shall do wrong without a previous consciousness of the nature of his offence; but it will often happen, that an ungoverned temper may hurry him away, that a desire of appropriating to himself the good things, of which he envies another the possession, may tempt

him to commit a violence or an offence. On these occasions, the municipal law appeared as the vindicator of the law of nature ; it annexed a penalty to the offence which the latter had prohibited ; it gave new force to the disregarded voice of conscience.

But very different was the reasoning, which our wise forefathers adopted in the case of a Right Withheld. They conceived, that every man, being absolute master of his own property, and at free liberty to dispose of it in any manner he pleased, would of course be cautious in the management of it, and would not intrust it to any but those in whom he could confide. The foregoing principle had completely secured to him the peaceable enjoyment of his own security and property ; a violent interruption of that enjoyment was considered as a wrong, and as such was liable to punishment. But a loan of money, or a bailment of goods, were his own voluntary acts. As such, being compellable to do neither, he was deemed to be accountable to himself for his own inattention, if the borrower of the money were deficient at the day of payment, or if the purchaser of the goods neglected or refused to satisfy him for their amount. But even here, in compassion to human infirmity, and for the maintenance of good faith, the law of his country did not leave him without a remedy. It did not indeed permit him to become a judge in his own cause ; nor did it annex to this merely civil offence the same punishment, which it had provided against the attempts of violence. Although the lender or the seller might have acted incautiously, the borrower or the purchaser was not to be suffered to obtain an unfair advantage from his want of prudence. An honest contract, from its very essence, required a due completion. At the moment when a man advanced his money or his goods, he acquired a right of satisfaction ; this right was not

to be defeated at the will of the person whom he had supplied, or to be satisfied otherwise than by an adequate return. To compel this return, to supply the defective honesty of the defendant, the law was ever awake, and ever ready to exert its interference. But, by the failure of a merely personal contract, unaccompanied by any act of violence, the defaulter was not supposed to have forfeited his liberty. The common law weighed offences in the balance of justice. As personal liberty and personal security were rights of equal importance, the citizen who offended against the latter was reasonably punished by a proportionable deprivation of the former. Personal property, however, stood in a different light. As an adventitious acquirement, it could not be placed on a level with the more important natural rights. Offences therefore against it were not to be punished in the same way. A more reasonable method was devised, by which, without depriving him of liberty, a man might be compelled to restore what he unjustly detained. We have already seen what that method was, and how complete and satisfactory it must have been. We have also seen by what means a new procedure was introduced. It were therefore needless to repeat what the reader will doubtless perfectly remember.

Evident, however, as such a distinction was, it was overlooked by this parliament; and a sweeping clause, confounding the natural with the adventitious rights of man, declared, that in all Actions upon the Case (that is, in plainer words, in almost every possible case in which a debtor could stand with regard to his creditor) his body should be liable to imprisonment. Such has been the construction invariably put upon this statute; and on the words, "That like process shall thereafter be had in actions upon the case, as in actions of trespass or debt," has
been

been founded the doctrine of imprisonment on Mesne process, as well as that upon a judgement. It is our business however to consider whether this construction has been rightly adopted, and whether this statute has laid a foundation sufficient to warrant so enormous a superstructure.

The authority here given is not independent and absolute; it is not simply said, that for the future, in Actions upon the Case, the person of the defendant shall be liable to imprisonment; but the process is directed to be the same as in Actions of Trespass or Debt. Let us therefore examine what that process was in each of these several actions.

In the consideration of an act of parliament which operates so strongly against the subject, the avowed purpose of which is to deprive him of his natural liberty, we must tie ourselves down to the strictest rule of construction. No latitude of interpretation is to be admitted. So much as the direct letter of the law will permit, and no more, is to be allowed to operate. Guiding ourselves therefore by this rule, we must pronounce, that so much of the enacting clause, as deduces the future process in Actions upon the Case from that directed in Actions of Debt, is merely void and of no effect, if, by that part of the clause, is meant a power of committing an insolvent to prison. When we meet with an act, the operation of which is by comparison, we are first to consider what was the effect of the former statute, on which this is founded, and to which it must be confined. And in doing this, we are not to attend to the abuses which may have sprung from it, or to the corrupted practice which the interest of individuals may have established. In a law invasive of a natural right, we must be confined to the law itself. Conformably with this reasoning, we must refer the reader to the fourth chapter of this part of the work, where he will meet with
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the history of the introduction of the statute 25 Edward III. ft. 5. c. 17, by which the same process, which had been used in a writ of accompt, was attempted to be introduced in an action of debt. He will there find that this attempt was unsuccessful; the two accountant acts having been repealed by the 34 Edward I. ft. 4. c. 4. they could legally give no process. A new process, therefore, founded solely upon them, was a mere nullity. But upon this second pretended process, which in fact existed nowhere but in the imaginations of those who were interested to maintain it, could any third process be founded? Where there were no premises, could there be any conclusion? Yet such is the case of the law now before us. It directs the process to be the same as in an Action of Debt. If therefore imprisonment in an action of debt was founded solely on a process which had ceased to exist; if the act itself which directed it has, agreeably with the reasoning towards the end of the same chapter, been since repealed by the statute 42 Edward III. c. 1. we can draw no other inference, than that this part of the enacting clause in the 19 Henry VII. c. 9. is absolutely void.

With regard to the other branch of this enacting clause, which directs the process to be the same as in actions of trespass, as it differs very essentially from the former, so must it be considered very differently. Here there was some ground to go upon: the person of the defendant in Actions of Trespass was liable to imprisonment. But even here the cause of humanity does not want an argument. Ever mindful of those great principles of natural justice, that the punishment shall be proportioned to the offence, that the natural liberty of a freeborn citizen of a free country should be held sacred, we may consider

consider what effect could legally be produced by this branch of the act.

And here we shall find a material difference, between the process used in Actions of Trespas, and that summary method of proceeding with regard to debtors which has been founded upon it. In Actions of Trespas, the imprisonment of the defendant was not allowable in the first instance. It was necessary to commence with an original writ, called a Pone, or an Attachment, which issued from the Court of Chancery, and was directed to the sheriff, for the purpose of compelling the defendant to appear in court on the day of the return of the writ. If the defendant voluntarily appeared at the time prescribed, he was permitted to find pledges for his future attendance, until the suit should finally be determined. If, on the other hand, he proved refractory, or neglected to appear, the law pursued a course different from that which it adopted in the case of a merely civil action. As in all cases of trespas, the ground of the suit was a wrong committed, not, as in the others, a right withheld, the violence of the wrong was supposed to require a more summary remedy for the party aggrieved. The society, which was wounded through the sides of the individual, was warranted in withdrawing its protection from the offender. To punish a breach of the peace, and to prevent it in future from being disturbed, a process was provided against the person of the contumacious defendant. This process was by a judicial writ, called a *capias ad respondendum*, issuing out of the court into which the original was returnable. By this the sheriff was authorized to take the body of the defendant, to keep him in safe custody, and to produce him in court. On his production, the intention of the writ being answered, he was at liberty to procure his personal release, by finding sufficient and responsible mainpernors

mainpernors or sureties, who became answerable for his due appearance from time to time in court, there to abide the event of the judgement. If he were unable to procure such sureties, the same principle which had induced the interference of the court to compel his appearance, pointed out the necessity of committing him to confinement, in order to prevent him from escaping that justice, before which he had manifested his unwillingness to appear. This being the regular and legal process in Actions of Trespass, the same, and no other, should be adopted in Actions upon the Case. To the experience of every impartial man we appeal, whether such a process has been adopted. Admitting for a moment every principle, on which we hitherto have proceeded, to be false, on this proposition we might confidently ground our argument; that so far only, as the present process in Actions on the Case corresponds with that which legally could be enforced in an Action of Trespass, it is good; beyond that, it is unjustified even by this law, and is an incroachment on the rights of the subject.

As to the reason and the propriety of this new regulation, something has already been said. Those additional observations, which a review of the whole subject might justify, will more properly find a place, where, in the course of our researches, we shall arrive at the period, when the evils, originating from this provision, arose to a magnitude unforeseen, and to a degree of atrocity unlooked for by the legislature. To that period we now proceed, when Oppression, once more let loose, lifted up her head on high; when, with Ignorance and Absurdity, her two fore-runners, she exercised her despotic sway; while Freedom fled from her approach, Population and Industry sunk beneath her grasp.

C H A P. VII.

BEFORE we proceed to a detail of the enormities, consequent upon the system which was at this time adopted, it will be proper to consider what that system really was, and how far the general practice was warranted by the law. The reader is already aware, that, as this doctrine was totally a stranger to the common law, it could become legal only by the sanction of acts of parliament, which originally were clear and unequivocal, and which were neither virtually nor actually repealed. By this rule we are to judge of every part of this system. As no law ever passed which declared in express words, that, in all cases, the body of the debtor should be subject to imprisonment at the will of the creditor, we must resort to those particular statutes, which gave this power in particular instances. Without now discussing the question, whether these laws, after they were made, were competent to confer this power, we are warranted in asserting, that the power, thus derived from these laws, whatever it was, could endure no longer than the laws themselves did. It therefore follows, that the two accountant acts of the 52 Henry III. c. 23. and 13 Edward I. c. 11. and the act of 25 Edward III. st. 5. c. 17. which extended the process given by them to actions of debt and detainue, having been annulled by the subsequent confirmations of the Great Charter, and particularly by the 42 Edward III. c. 1. are to be considered as having no longer any authority to justify the process founded upon them. The only remaining act was the 19 Henry

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Henry VII. c. 9. which gave the same process in Actions upon the Case, as in Actions of Trespass. This indeed continues unrepealed; and, however contrary it may be to the reason of the common law, and to the rights of Englishmen, it must be allowed, even at the present day, to stand in force. We are not, however, to allow to it a greater extent than a strict construction will warrant. Whatever force it has is concentrated in itself, and cannot be extended so as to comprehend any other species of actions. The conclusion must therefore be, that in Actions upon the Case alone process of *capias* may legally be used; that in Actions of Account, of Debt, and of Detinue, the antient process adopted by the common law is the only process which ought now to be adopted by us.

But this conclusion, as it did not suit with the convenience of interested individuals, or of equally interested courts of justice, was very speedily disregarded. The same process, which was now introduced in Actions upon the Case, continued to be used in Actions of Account, of Debt, and of Detinue. In a word, the practice throughout the kingdom was precisely the same, as if a law had been passed, allowing generally the imprisonment of the defendant in all possible cases of insolvency.

That many and great evils should have arisen from a system so corrupt and unconstitutional, cannot be surprising. When the laws were thus disregarded, when the liberties of the people were in this arbitrary manner affected, the natural consequences were oppression, perjury, distress, and ruin. But whence are we to draw our proofs, to justify this representation? Such assertions, we shall be told, should be well authenticated; vague accusations cannot carry a weight, sufficient to impeach the virtue of a whole people, or to criminate the conduct
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of the venerable interpreters of our law. Facts, and those of a nature not to be disputed, are to be produced, before we can give our assent to charges so atrocious.—Although the experience of every man may perhaps afford him such facts, yet we do not mean so lightly to rest our evidence. We have proofs of the highest and most sacred nature. The voice of the legislature itself, awakened by the cries of the unhappy, will proclaim the truth of our charges. Let us listen to that authority, which heard the complaints of the miserable, which lamented and deprecated the enormities of the oppressor, which administered occasional and partial remedies, but which permitted the cause of the disorder to continue, and sanctified, by its connivance, the abuses which it ought to have exterminated.

In all cases where men, apprehensive of no danger, are lulled into a false security, a long time must elapse, before they can be brought to give up this flattering idea. The partial sufferings of individuals, however grievous to themselves, do not immediately affect the community. Nor do the evils of Corruption display themselves at once in their full colours. Timid at first and cautious, it flies from the public view, and shelters itself in privacy. As by degrees it grows stronger, it assumes a new boldness; the further it advances in its course, the more obscure its origin becomes: the people, who perhaps were hardly aware of its commencement, who knew not its tendency, and therefore were unable to provide against its effects, at length aroused to a sense of the miseries it has entailed, behold with mingled horror and dismay the monster whose growth they had neglected to watch. They at once find themselves at the mercy of a pitiless tyrant, who tramples with impunity on their liberties and rights; they view him invested with the insignia of law. Sur-
rounded

rounded by ministers of justice, countenanced by those appointed to watch over the constitution, he governs with a rod of iron. The liberties of the free citizen fall before him; the language of mercy and of reason is no longer heard; personal vengeance, oppression, and perjury, invited as it were to display their malevolent powers, combine their force, and multiply destruction.

Such was the situation of this country in the year 1566. The act of 19 Henry VII. c. 9. from which probably no such disorders had originally been expected, had, during a period of above sixty years, sufficiently extended its baleful influence. It is indeed difficult to imagine how it was possible, in a country like this, for abuses to swell in so short a time to so tremendous a magnitude. The circumstance itself is so little probable, that evidence of a common nature will hardly be admitted to prove it. It is, however, too completely proved, by the declarations contained in the statute 8 Elizabeth, c. 2. which was made to remedy and to prevent a continuance of this crying grievance. In this act, the legislature informs us, that it was become usual for divers persons, *of their malicious minds, and without any just cause*, to cause and procure their fellow subjects to be greatly molested and troubled, by attachments and arrests made of their bodies, as well by process of *Latitat*, *Alias et Pluries Capias*, sued out of the court of King's Bench, as by *Plaint*, *Bill*, by other suit in the court of the Marshalsea, and within the city of London, and other places, where there was liberty or privilege to hold pleas of debt, trespass, and other personal actions and suits; when the parties so arrested and attached were brought forth to answer the actions brought against them, *very frequently no declaration or matter was laid against them*, to which they might make answer; by means of which

which the defendant was maliciously put to great charges and expences, without any just or reasonable cause. Yet nevertheless, continues the same authority, hitherto, by order of the law, the party so grieved and vexed could never have any costs or damages awarded to him, for such unjust vexation and trouble.

By this authentic declaration, we find how deplorable was then the situation of unprotected individuals. The power of arresting a defendant, improper and impolitic enough in the hands of the fairest creditor, was already converted into the instrument of malice and oppression. No man could be guarded from it; the most perfect solvency was become an insufficient protection.

To remedy the inconvenience, to which persons were exposed by these false and malicious imprisonments, the statute ordained, that if, within three days after the defendant had put in bail, the plaintiff did not file his declaration; or if, after putting in such declaration, he did not prosecute his suit with effect, but should wilfully suffer it to be delayed, or to be discontinued, or should be non-suited; the judges should award to the person so vexatiously arrested his costs, damages, and charges, to be satisfied by the plaintiff.

This, however, was not the only grievance which called for redress. It was grown to be a common practice, for any man, who envied the prosperity of his neighbour, who was desirous of putting out of his way a more successful competitor, or who wished to gratify the calls of personal hatred, to cause another to be arrested at the suit, either of some person who in fact did not exist, or of some one who had no cause of action, and who was ignorant of the malicious prostitution of his name. To what lengths will not the depravity of mankind go, when an unli-

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mitted field for the exercise of their passions is afforded to them, when the municipal law dares to remove the sacred land-marks of the law of nature? What apology can be made for a practice, which thus instantly as it were opened the sluices of oppression, of fraud, of perjury, nay, oftentimes perhaps of forgery? Will other nations, which look with an envious eye on our vainly boasted liberties, believe that on English ground such enormities were ever committed? Can they believe that such enormities are still committed; that the cause of them is known, and that it still is permitted to exist? Such, nevertheless, is the truth; such must continue to be the truth until the legislature, opened to conviction, shall at length extend a fostering hand to heal the wound, which former legislatures have inflicted upon the constitution. But if this expected time should ever arrive, decisive measures must be taken, and a different course must be pursued, from that which the framers of the statute now before us followed. They were satisfied with denouncing against the offender an imprisonment for six months, treble damages, and a forfeiture of 10l.* Was this sufficient? Was here the balance of justice equally weighed? What compensation was hereby given to the injured citizen? How could the loss of his credit, the murder of his future expectations, the imprisonment of his body, the misery, the ruin of himself and of his posterity, be assailed in damages? Nor was the penalty of six months imprisonment, and a fine of ten pounds, sufficient to restrain the malice or the vengeance of the depraved. Amidst the innumerable combinations of human interests and passions, how frequently will opportunities occur, where the advantage expected from iniquity may overbalance the

* 8 Eliz. c. 2. § 4.

punishment to be dreaded from a detection? When we find, that even the severest denunciations but ineffectually prevent the daily commission of offences, what can be hoped from this slender and ineffectual barrier? But, in this particular instance, it was doubly incumbent upon the law-makers to be watchful. From the very nature of the offence, it frequently must have happened, that the perpetrator of the crime could not be discovered. Where a man was so lost to virtue, as to break through the laws of morality, and to persecute another upon whom he had no demand, he must have been sensible, that, by going one step farther, he might effectually secure himself from every possibility of danger. To callous consciences a succession of crimes is natural. By adding perjury to fraud, by assuming himself, or by engaging another to assume, a borrowed name, he might obtain every thing which a malevolent heart could desire. The unsuspecting victim of his malice would be torn from his dwelling, would be immured in a dungeon; his prosperity would be blasted, and his remedy would be defeated: while his persecutor, triumphant in successful malice, and glutted with destruction, would stand secure, and, shrouded in the darkness of inexplicable mystery, mock at the impotence of idle laws.

Enormous as was the grievance, for which a remedy was proposed by the preceding act, it was but a part of the mischiefs which arose from this oppressive practice, and consequently the wholesome operation of the statute the 8th of Elizabeth, c. 2. was extremely circumscribed, and confined to a few of the unhappy sufferers. The gaols became daily more crowded with prisoners; the cries of the unhappy still were heard, for the miseries of the people still continued unrelieved. These cries ascended even to the throne; and the monarch was moved to pity the

calamities of her subjects, to restore to freedom and to happiness the honest and the industrious. How are we to lament, that the soundness of her judgement did not equal the benevolence of her heart ! It might be imagined, that the most ready, as well as the most effectual way to accomplish this purpose, would have been to consider the causes of these acknowledged grievances, to examine the laws, and the practice of the several courts of justice, which had given birth to a custom impolitic and inhuman in itself, and inadequate to the intended purpose. Had such a course been pursued, the community would probably have been relieved from the miseries under which it laboured, and these pages might never have been submitted to public consideration. But the same mistaken policy, which, like a charm thrown upon the operations of the legislature, had in so many instances prevented them from doing effectual good, in the present instance equally impeded the praiseworthy intentions of the sovereign. Queen Elizabeth saw no farther than her parliament had seen : her regulations, therefore, however well and charitably intended, produced but little real advantage. Having taken into consideration the complaints and supplications of many of her subjects imprisoned in the King's Bench and Fleet, and commiserating their distresses, she issued a proclamation, bearing date the 20th day of April, 1585, authorizing certain commissioners therein mentioned, to order and compound controversies and causes between prisoners and their creditors, and such others by whom they were detained prisoners or in execution *. This commission continued in force until her death ; and, according to the system of those times, was considered as having the force of a law. Of what consequences it was

* Rym. Fœd. Tom. XVII. fol. 117.

productive, we are unable to say. It should seem probable, that it could be productive but of little good; particularly as it was so soon after found necessary to devise a new regulation, grounded, among other things, upon the inexpediency of the former.

But before we proceed to the consideration of this new regulation, we must take notice of a very remarkable decision of one of our superior courts of justice, upon the circumstance of the legality of the practice of imprisonment for debt. In the year 1586, three persons, Clere, Woodhouse, and Gervys, acknowledged a recognizance of 200*l.* in the Court of Chancery to Ognell; on which, in the following year, Ognell sued a Scire facias out of the same court against the recognizers, upon which a return of Nihil was made. The same thing happened upon a second Scire facias; whereupon judgement was given that the plaintiff should recover, &c. and that he should have execution against them. In consequence of this, he sued out a writ of Levari facias; upon which it being returned that they had nothing, the court awarded a Capias ad satisfaciendum, directed to the sheriff of Norfolk; by force of which he arrested Woodhouse and Gervys, who afterwards made their escape. On this escape, Ognell brought an action of debt against the sheriff in the Court of Exchequer. On the hearing of the cause, it was resolved by the Chief Baron Sir Roger Manwood, and the other Barons, *that the award of the Capias ad satisfaciendum was erroneous; for by law the bodies of the recognizers were not liable to execution* *.

This is a determination of great authority, and is little less than conclusive in the present question, as it shews the opinion which honest and unbiassed judges entertained of the statute the 25th of Edward

* 8 Co. 142.---Trin. 31 Eliz.

the Third, which gave the process of Capias in debt. They must have conceived that this statute had no legal operation; otherwise they could not have disputed the propriety of the arrest. For their decision was grounded on the principle of the common law; by which, as well as by the statute 13 Edward I. c. 18. when an individual sued a recognizance or a judgement for debt or damages, he could not have the body of the defendant, nor his lands (unless in special cases) in execution *. Now had they conceived that the statute of Edward III. had any legal operation, they must have made a contrary determination, and must have admitted that the course of the common law had been superseded by it. As the determination stands, it is a very convincing proof in favour of our argument; and shews, in the most evident manner, that the judges did not admit the statute of Edward III. to have any authority. A single decision of this conclusive nature is a stronger argument than the longest practice. A custom, however radically bad, may be supported and cherished by the interest of individuals, and by the prejudices or the ignorance of the multitude. But the judgement of a court of justice, founded on a conviction, the result of serious and unbiassed reasoning, becomes the test of truth, and an unerring land-mark amidst the confusion of general uncertainty.

We now proceed to the new regulation, framed for the purpose of improving upon the charitable provisions of Queen Elizabeth. This was a proclamation of King James the First, dated at Westminster on the 11th day of November, 1618, under the privy seal, and directed to the two Chief Justices, the Judges, and Barons of the Exchequer, the Masters

* Cro. Jac. 450. 2 Inst. 394. Vide Sir William Harbert's Case. 3 Co. 11. b.

of the Court of Requests, the Serjeants at Law, the Attorney and Solicitor General, the Attornies of the Court of Wards and of the Dutchy of Lancaster, the Deans of St. Paul's and St. Peter's, the Recorder of London, the Chancellor of the Bishop of London, the Masters in Chancery, the Clerk of the Crown and the Prothonotaries of the King's Bench, and to the Prothonotaries of the Common Pleas *. After briefly reciting the proclamation of Queen Elizabeth, his Majesty proceeds thus:—"And whereas for that certain claufes contained in the said commiffion have feemed unto fome to be derogatory to the common laws of this our kingdom, and alfo for that by colour of the said commiffion, which was intended for the charitable relief of poor, miferable, and diftressed persons, fundry refractory and obftinate debtors, which rather wanted will than means to fatisfy their juft debts, took occafion to moleft and trouble their creditors; We, whose princely care and vigilancy always watcheth to prevent all occafions of inconvenience to our loving fubjects, efpecially fuch as tend to the breach of our laws, have hitherto foreborn the renewing of the said commiffion, which our forbearance, as it hath wrought a good effect by difcouraging of obftinate and wilful debtors, that feek nothing more than evafions to avoid the payment of their juft debts, *fo it hath been found by experience, that, for want of that, or fome other like charitable courfe for the relief of fuch as are truly and indeed poor, diftressed, and miferable, and want means to fatisfy their creditors, hath been an occafion to pefter and fill our prifons with the bodies of thofe persons, whose imprifonment can no way avail their creditors, but*

* Rym. Fœd. Tom. XVII. fol. 116.—Rot. Pat. 16 Jac. I. p. 16. dorf.

“ *rather is an hindrance to the satisfaction of their*
 “ *debts, for that, during the time of their restraint,*
 “ *they are in no wise able to go about, or attend their*
 “ *lawful business, but must of force consume themselves*
 “ *and that little they have miserably in prison: We*
 “ therefore, upon due consideration had of the pre-
 “ mises, by the advice of our right trusty and right
 “ well-beloved Councillor, Sir Francis Bacon,
 “ Knight, our Chancellor of England, and also of
 “ divers of our principal Judges of our Courts of
 “ Westminster, have thought fit and determined to
 “ prescribe and direct such a moderate course, as
 “ that neither the insolvency of wilful and obstinate
 “ debtors should be thereby encouraged to the de-
 “ rogation of our laws, nor yet our grace and cle-
 “ mency be wanting unto such to whom it shall be
 “ meet to extend the same:

“ Know ye, therefore, that We, of our special
 “ grace, certain knowledge, and meer motion, have
 “ made, constituted, and appointed, and by these
 “ presents do make, constitute and appoint you to
 “ be our commissioners, and do hereby give and
 “ grant unto you, or any three or more of you, full
 “ power and lawful authority, at all and every time
 “ and times from henceforth, so often as to you, or
 “ any three or more of you as is aforesaid, shall
 “ seem convenient or needful, within or during the
 “ time of Easter Term, Michaelmas Term, and Hi-
 “ lary Term, or any of them, or within seven days
 “ before the beginning, or after the ending, of every
 “ of the said terms respectively, and not otherwise,
 “ to assemble and meet together, in some such con-
 “ venient place in or near our city of London, as
 “ you, or any three or more of you, shall think fit,
 “ for the execution of this our commission, and be-
 “ fore such your meeting, by warrant under your
 “ hands, or the hands of any three or more of you,
 “ (whereof

“ (whereof some of the judges of the court, by or
 “ from which such prisoner or prisoners shall be
 “ committed, to be always one) upon reasonable
 “ warning, and at the charges of the prisoners, to
 “ call before you, as well some person sufficiently
 “ instructed for and on behalf of such distressed pri-
 “ soners as now are, or hereafter shall happen to be,
 “ imprisoned in our said prisons of King’s Bench
 “ and the Fleet, or either of them, by reason of or
 “ for any action of debt, action upon the case, tref-
 “ pass, detinue, trover, or other personal action,
 “ judgment, or execution, whereof the debt or
 “ execution shall not exceed the sum of two hun-
 “ dred marks; as also the creditors and such others
 “ as have the benefit of the actions, suits, judge-
 “ ments, or executions, for which they are detained
 “ in prison, and the executors, administrators, and
 “ attornies of every of them, and all other persons
 “ whatsoever to whom it shall appertain, or some
 “ persons sufficiently authorised and instructed for
 “ and on their behalf, whom we do hereby com-
 “ mand to appear before you upon such your war-
 “ rants, either in their own persons, or by some
 “ other sufficiently instructed and authorised on their
 “ behalf; and, at such your meeting, to receive the
 “ supplications and complaints of the said distressed
 “ prisoners, and by all lawful ways and means to
 “ inform yourselves, as well of the due debt, da-
 “ mage, and duty, for which such action, suit, plaint,
 “ judgment, or execution, is or shall be prosecuted,
 “ obtained, or gotten, as of the certain estate and
 “ hability of the prisoners how to pay and discharge
 “ the same: and thereupon by all good and lawful
 “ ways and means to *treat, persuade, mediate, and*
 “ *procure* composition and agreements with the cre-
 “ ditors or other persons which have, or shall have,
 “ the benefit of such actions, suits, judgements, or
 “ executions,

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“ executions, wherein our pleasure is, that some of
 “ the judges of the court, by or from which the
 “ said prisoner or prisoners shall be committed, shall
 “ be privy and consenting to the conclusion of such
 “ compositions and agreements; and that such of
 “ you our said commissioners as shall go about such
 “ compositions, shall do your best endeavour that
 “ the poor prisoners, by your means and mediation,
 “ may be relieved, and *have such reasonable years,*
 “ *days, and times of payment,* for such of their debts
 “ and damages, as they shall be presently able to sa-
 “ tisfy; and with such security for payment thereof,
 “ as in equity and good conscience, *having respect to*
 “ *the ability of the prisoner, and the charge of wife and*
 “ *children, and other incidents in such pious cases con-*
 “ *siderable,* as by you shall be thought fit.

“ Straitly charging and commanding you and
 “ every of you, that, for the better expedition and
 “ further accomplishment of our charitable intent
 “ and will in remedying the *grievous distresses of our*
 “ *said poor subjects and distressed prisoners,* you, or
 “ some such three or more of you as is aforesaid, do
 “ from time to time, when and as often as it shall
 “ be needful, within the times before limited, and
 “ not otherwise, assemble yourselves in some such
 “ convenient place as is aforesaid, as you tender our
 “ pleasure; and if any such creditor or creditors, or
 “ other person or persons, for whose debts, costs, or
 “ damages, such distressed prisoner or prisoners shall
 “ remain in prison as aforesaid, shall refuse, upon
 “ your said precepts or warrants, to appear before
 “ you, or to send some other person or persons, suf-
 “ ficiently authorised or instructed, to treat and con-
 “ clude with you as aforesaid, then you, or any three
 “ or more of you as aforesaid, (whereof some such
 “ judge as aforesaid to be always one) upon due
 “ consideration of the nature and quality of such
 “ refusal

“ refusal and contempt, shall and may take such
 “ order for punishment of the same, and for pro-
 “ curing such person’s appearance, as to justice shall
 “ appertain.

“ And that you, or such three or more of you
 “ (whereof such judge as aforesaid to be one) shall
 “ and may use all lawful ways or means to cause such
 “ creditors and other person and persons to yield and
 “ perform such moderate and reasonable composi-
 “ tions and agreements, as by you, or any such three
 “ or more of you (whereof such judge as is aforesaid
 “ to be one) shall be thought meet.

“ And for that our meaning is to be aiding and
 “ assisting with our grace and favour to the miseries
 “ and calamities of such as are truly poor and dis-
 “ tressed, and not to such as lie in prison rather for
 “ wilfulness and obstinacy, and out of resolution to
 “ retain large and ample estates to themselves, by
 “ hindering their just and honest creditors; we do
 “ hereby straitly charge and command you, and
 “ every of you, that, in all your proceedings by vir-
 “ tue of this our commission, you be very circum-
 “ spect and careful to try and find out such wilful
 “ and obstinate persons, and in no wise suffer them,
 “ or any of them, to partake of our said grace or
 “ mercy, which we hereby intend unto them that
 “ are, and shall be, willing with their whole estate,
 “ *bonâ fide* and without fraud, so far as it will ex-
 “ tend, to satisfy their just debts and damages, for
 “ which they shall be so detained in prison; *some*
 “ *tender consideration being had of themselves, their*
 “ *wives and children, and unto such poor and miserable*
 “ *persons as have not wherewith to satisfy their debts,*
 “ *but shall be constrained miserably to perish in prison,*
 “ *except in pity they shall be relieved.*”

The spirit of tenderness and compassion, which
 breathes throughout this proclamation, makes one
 regret

regret the insufficiency of the means employed for such a noble purpose. Intreaty, persuasion, and mediation, will avail but little to soften the heart of an obdurate creditor. The man who can withstand the feelings of humanity, who can behold unmoved the husband torn from the arms of his distracted wife, or the parent from the bosom of his helpless and imploring infants, who can hear the supplications of the miserable, without a compassionate sigh or a relenting heart, is not to be assailed by such ineffectual weapons. We cannot therefore be surprized, when we find that this proclamation effected very little of that good for which it was calculated *. The commissioners met, the formalities of business were observed; but the creditor was not mollified, the unhappy prisoner was not relieved.

In the year 1623, another grievance, consequent upon and immediately springing from the adoption of this practice, presented itself to the consideration of the legislature, and called for an immediate and vigorous interposition. It might indeed easily have been foreseen, and as easily might have been provided against, had the system of Insolvency been founded upon any settled principles. The evil complained of was, that persons of sufficiency in real and personal estate, more desirous of defrauding their creditors, than of honestly satisfying them, oftentimes obstinately and wilfully preferred to live and die in prison, rather than to discharge or make satisfaction for their just debts according to their abilities †. That such a conduct should have been extremely displeasing to those creditors, who had formed expectations of payment from the confinement of their debtors, is in no wise astonishing; they must have felt the

* Rym. Fœd. Tom. XVII. fol. 596.

† Preamble to Stat. 21 Jac. I. c. 24.

disappointment of their favourite passion, and have experienced the consciousness of oppression and unchristian-like cruelty, without the satisfaction of having profited by them. But it is not extraordinary, that in many cases debtors should have been tempted to enjoy in prison those comforts, of which, in a state of liberty, they must have been deprived. There are many who, if they can gratify a favourite appetite, will willingly relinquish a privilege, the value of which perhaps they may never have considered, the privation of which perhaps either their sensations are too callous to feel, or their philosophy is sufficient to condemn. In either of these instances, the remedy of the creditor must necessarily be defeated; for it is of little consequence, whether the debtor is totally insolvent, or whether he prefers the abundance of a prison to the wants of a state of freedom. This being the case, what judgement are we to form of that system, which, at the expence of our most valuable rights, and in opposition to the most positive laws, proved so inadequate to the intended purpose? Can there be a stronger proof of the radical imperfection of a custom, than the complaint here made by the legislature? Or can there be a more forcible instance of the hasty and incautious conduct of any set of law-makers, than the very regulation now introduced for the purpose of removing a doubt, to which this behaviour of debtors had given rise? The doubt was this: whether, if any person, being in prison and charged in execution by reason of any judgement given against him, should afterwards happen to die in execution, the party at whose suit, or to whom such person stood charged in execution at the time of his death, should be for ever after concluded and barred to have execution of the lands and goods of such person so dying *? To

* Preamble to Stat. 21 Jac. I. c. 24.

avoid such doubts and questions for the future, and to prevent the deceit above complained of, the statute 21 Jac. I. c. 24. was made; which enacts, "That the party or parties, at whose suit, or to whom any person should stand charged in execution for any debt or damages recovered, his or their executors or administrators, may, after the death of the person so charged and dying in execution, lawfully sue forth and have new execution against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he or they, or any of them, might have had, if such person so deceased had never been taken or charged in execution."

This regulation arose from the distinctions, which courts of justice had introduced into the business of executions. No less than five, perfectly different in their natures, were now in use. The first was by the writ of *Capias ad satisfaciendum*; by which the body of the debtor was imprisoned until payment should be made of the debt, costs, and damages. The second was by the writ of *Fieri facias*, which subjected the goods and chattels of the defendant to the satisfaction of the plaintiff's demand. By the third, which was grounded on the writ of *Levari facias*, the debt of the plaintiff was to be levied on the goods and the rents and profits of the lands of the debtor. The fourth was by writ of *Elegit*; by which, as we have before seen, the goods and chattels of the debtor were to be appraised, and to be delivered to the creditor, in part satisfaction of his demand; and in case they should prove insufficient, the moiety of the defendant's lands were to be delivered to him, to be held until the debt should be discharged by the rents and profits. The fifth species of execution was by an extent, or *Extendi facias*, grounded upon

upon the statutes Merchant and Staple, by force of which the body, lands, and goods of the debtor were seized altogether to satisfy the creditor. It was the first of these, or the execution founded on the writ of *Capias ad satisfaciendum*, which gave rise to this statute; and upon this, several observations will naturally present themselves. It must strike us, that the parliament took up this matter very hastily, and appointed a remedy for a grievance, which in fact did not exist, and for which, supposing it to have existed, a remedy was already prepared. A debtor must either have been solvent or insolvent. If he were insolvent, this act would have nothing to operate upon. If he were possessed either of land or of personal estate, this act could add nothing to the remedies which, by the existing law, the creditor might have had. The writ of *Fieri facias* would have given him execution of the personal estate; the writ of *Levari facias* would have added the rents and profits of the real estate; if both these proved insufficient, the writ of *Elegit* would have given him half of the real estate itself. To all of these the creditor was already intitled. After this, what benefit could accrue to him by this new provision? But farther—Had this statute gone no greater length, had it merely given a remedy where no remedy was wanting, its operation would at least have been innocent. But that is not the case. The generality of its phrase gives no inconsiderable sanction to a species of execution, which, however by the connivance of courts of justice it might have become usual, was undoubtedly unwarranted by the law. We have already seen, that the act of Henry VII. extended the *Capias* no farther than to Actions upon the Case; that in Actions of Account, of Debt, and of Detinue, the common law process, and no other, could legally be used. This statute, by mentioning generally executions for
debt

debt or damages recovered, observes no such distinction; and how readily every such incautious declaration of the legislature was tortured to the purposes of oppression, we have already seen too many instances now to entertain a doubt. It may perhaps be said, that a necessity did exist for the publication of this law; this species of execution being of so high a nature, that, when the body of a man was once taken upon it, no other process could be sued out against his lands or goods. Admitting this to be true, does such a consequence necessarily follow? Had not the plaintiff the choice of his remedies? If the defendant had lands and goods, might he not have sued out that process which would have subjected them to his demand? If he neglected to do so, if he preferred the body of his debtor, which was worth nothing, to his estate and effects, which might have satisfied, either totally or in part, the debt due from him, had he a right to any further assistance from the legislature? Was it just, was it agreeable to common sense, that a creditor should be permitted to gratify his vengeance by the perpetual confinement of his debtor, and that afterwards, when he could no longer torment the body of his victim, he should be permitted to seize upon his property, "as if such person so deceased had never been taken or charged in execution?"

In the year 1624, King James issued another proclamation, bearing date the 10th day of July, in the two and twentieth year of his reign, authorizing certain commissioners to order and compound the causes of distressed prisoners and their creditors in the prison of the Marshalsea, and other prisons in and about the cities of London and Westminster, whose case, as his Majesty observed, was as much to be commiserated and lamented as that of the prisoners in the King's Bench and the Fleet.

A similar proclamation was issued by King Charles the First, bearing date at Canterbury, the 6th day of June, in the fourth year of his reign. But this proving unsatisfactory, and the complaints of the poor prisoners having reached the ears of the Monarch *, he again, in the year 1630, issued a proclamation, bearing date at Westminster on the 31st of December, in the sixth year of his reign, directing certain commissioners, of whom the Archbishop of Canterbury was the chief, to order and compound the causes of creditors and the poor prisoners (whose debts did not exceed the sum of two hundred pounds) in the several prisons of the King's Bench, the Fleet, the Marshalseas, the White Lion, the Clink, the New Prison, the Counter in Wood Street, the Counter in the Poultry, Ludgate, Newgate, the Gatehouses, Saint Katherine's, White Chapel, Brunghurst and Finchbury, and all other prisons near or about London †. This proclamation was evidently calculated to make such regulations as were not so easily to be evaded, and effectually to answer the purpose for which, by the royal benevolence, it was intended. But here also the intention was better than the execution. Persuasion and mediation were still the only measures directed, and still they proved incompetent to the purpose.

In this situation the interest of poor debtors continued for a considerable time. The turbulent and distracted state, into which the kingdom was soon after thrown, rendered an attention to them impossible. It was not until after the parliament had obtained a decided superiority, that men found themselves at leisure to reflect upon the miseries of their fellow-creatures. The early attention, however, which

* Rym. Fœd. Tom. XIX. fol. 229.

† Ibid. fol. 228.

was bestowed upon this subject, is no mean proof of the enormous height to which its excess must have been carried. When the kingdom was yet convulsed with intestine divisions, when the perilous state of affairs, both at home and abroad, would have warranted a disregard to the interests of individuals, the situation of insolvents called strongly for the interference of the legislature, and became one of the first objects of their consideration. Accordingly, in the parliament held immediately after the execution of King Charles the First, the first Insolvent Act which we have upon record was passed. It appears as the 56th chapter of the Ordinances of the year 1649 *. By this act it was provided, that the judge or judges of that court whence the process issued, upon which any person was imprisoned upon any process or execution, where the cause of action was originally for debt, upon request of the prisoner, and upon his swearing, " That, *bonâ fide*, he or she was not worth
 " in possession, reversion, or remainder of any estate,
 " real or personal, to the value of five pounds, besides
 " fides necessary wearing apparel, and bedding for
 " himself, his wife and children, and tools necessary
 " for his trade or occupation, not exceeding the value
 " of five pounds; and had not directly or indirectly
 " conveyed or intrusted his or her estate,
 " thereby to expect any profit, benefit, or advantage ;" that the judge or judges should, by warrant under their hand and seal, summon the plaintiff to appear before them within 30. days after due notice. If the plaintiff should fail to appear, or to assign some good excuse for his neglect, or should appear, and be unable to deny the truth of the oath, that then the prisoner should be discharged. The penalty for taking a false oath was, besides a prosecution

* Scobel. 1649. 56.

cution for perjury, a recommitment to prison. The judgement and execution obtained by the plaintiff was still to stand good against his estate and effects. So far the intention of the legislature, if it was not wise, was humane; but the merit of the act was greatly diminished by a partial and unjust provision tacked to it at the third reading, by which it was declared, that the benefit of this act should not extend to any person who had been in arms against the parliament. This proviso had nearly miscarried, and at length passed but by one vote *. The consequence of which was, as the writers of the Parliamentary History observe, that no doubt many poor wretches were left to rot in gaol, who had spent their fortunes in the service of their King, and were now so unhappy as to be thrown there by their merciless creditors †.

Nothing so strongly proves the imperfection of a law, or the insufficiency of the law-makers, as the suddenness of the necessity to alter or to new-model it. Where a due attention is bestowed upon the formation of a statute, regulated by a sufficient knowledge of the antecedent law, and of the causes which call for an interference, it can seldom happen that such a statute can require an immediate alteration. The majority of our good laws are among the oldest in our code; they have stood the test of ages, and still flourish with unimpaired vigour. But where a building is hastily run up, without a due regard either to the foundation on which it is placed, or to the materials of which it is composed, it is no wonder, that the repairing hand of the workman is speedily called in, to patch up and to support the tottering edifice. Such was the case of this first insolvent act; which was found so inadequate to the intended pur-

* Comm. Journ. 4 Sept. 1649.

† Parl. Hist. v. XIX. p. 169.

pose, that, within three months after its publication, it was judged necessary to introduce some new regulations. For this purpose, a new ordinance was made in the same parliament * ; by which it was provided, that, upon the petition of any person confined upon execution, or other process, where the cause of action was originally for debt, breach of promise, contract, or covenant, any justice of the peace of the county, or place where he was so imprisoned, should make his warrant, under his hand and seal, in the nature of a Habeas corpus cum causa, returnable at a short day, to the sheriff or gaoler, to bring up without delay the body of the prisoner, with the cause of his imprisonment ; if, upon the return of the writ, it should appear that the party was imprisoned for any of the above-mentioned causes, the justice was then authorized to administer to him the following oath : “ That *bonâ fide* he or
 “ she is not worth, in possession, reversion, or remainder of any estate, real or personal, except
 “ only the debts due to him or them from the parliament for the service of the Commonwealth, to
 “ the value of five pounds, besides necessary wearing
 “ apparel and bedding for himself, wife and children, and tools necessary for his trade or occupation, not exceeding the value of five pounds ; and
 “ hath not directly or indirectly sold, leased, or
 “ otherwise conveyed or intrusted, his or her estate,
 “ or any part thereof, to expect any profit, benefit,
 “ or advantage, or to deceive or defraud his creditors.” The justice was then to certify the above into the court whence the process issued. Upon the return of this certificate, the judges of the court were directed to issue one or more writs of Scire facias, with a Non omittas propter aliquam libertatem,

* Scobel. 1649 65. Comm. Journ. 21 Dec. 1649.

grounded upon the certificate, directed to the sheriff or mayor within whose jurisdiction the prosecutor was known or supposed to live; who, upon 14 days due notice, was to appear to shew cause why the prisoner should not be discharged: if he should not appear, or, on his appearance, if he should confess the surmise of the writs to be true, or should be unable to prove it to be untrue, judgement should be given by confession for the discharge of the prisoner. By this ordinance the prisoner was allowed to sue in formâ pauperis. All judgements against his lands and goods were to remain in force, except against his bedding, wearing apparel, and tools. The punishment of perjury was the same as that given by the preceding act.

An addition was made to these provisions in the following year by an ordinance anno 1650, chap. 6 *. whereby it was enacted, that prisoners, having taken the oath prescribed, should be permitted to enjoy their liberty, and to go abroad during the time limited in the Habeas corpus, on their personal security.

In the year 1653, the parliament again took this subject into consideration, and passed an ordinance †, by which certain persons therein named were appointed judges, to hear and determine, in a summary way, the causes of the imprisonment of all persons then committed for any civil cause, or within a fortnight after to be committed to any prison. The power delegated to these judges was nearly that which had been delegated to the Commissioners of Bankrupt, of which we shall treat hereafter. But they were also invested with several extraordinary powers, which hitherto had been unknown to the laws. Where any person in prison, or dying in prison for any debt, or after any judgement against him unsatisfied, had made a voluntary settlement of any

* Scobel. 1650. c. 6. fol. 116.

† Scobel. anno 1653. c. 13.

part of his estate, in trust for himself or any other person, after such debt or judgement, the judges were authorized to sell and dispose of such estate, for the satisfaction of the creditor. They were empowered to fine those convicted of fraudulent concealment; and, in case of an inability to pay, to sentence them to the pillory, or to the workhouse. Where it appeared that any prisoner was able to discharge his just debts, yet did not do so, they might order him to a strait imprisonment; and where any person lay in prison for the debt of another, they were directed to sell the estate of such other person as fully as if it had been the estate of the prisoner. They were farther to send to the house of correction such obstinate prisoners, as should lie in prison through their own wilful default, or should have run into debt by their vicious course of living; they were to regulate all charities given to prisons, to establish regular tables of fees, to prevent the extortion of gaolers, and to make orders for selling beer and other provisions to the prisoners. These judges were not to be responsible for any thing done in pursuance of this act but to parliament only. And, as a satisfaction for their trouble, they, or any three or more of them, were empowered to retain, out of the money arising from the sale of a prisoner's estates, six pence in the pound; except only in London, Westminster, Middlesex, Surry, and the Borough of Southwark, where they were to retain no more than two-pence in the pound.

The very extraordinary clauses in this ordinance make it not at all surprizing, that a necessity should speedily have arisen to modify and to new-model it. Within a twelvemonth after it was passed, many complaints were made to the Protector and his council, that the lands and goods of various persons, of which they were lawfully seized and possessed at the time of making the above act, had, by construction of several clauses therein, been sold, leased, granted,

or otherwise disposed of by the judges, for the satisfaction of other mens' creditors, as part of the prisoner's estate, notwithstanding that such persons had, at the time of passing the said act, as sufficient an estate in the said lands and goods as the law of the land could give them. To relieve the public from this enormous oppression, a new ordinance was made *, containing a confirmation of the former, subject to certain alterations. By these a time was limited, beyond which the judges were not to go, in the sale of the estates of those persons for whose debts prisoners were confined; a regulation was directed, with regard to the order in which debts were to be paid; and additional powers were given for the prevention or the punishment of fraud. It was farther declared, that no creditor should receive any benefit from this act, unless he should give a legal discharge for the whole or part of his debt, as the case might be; and that the judges might, upon good security, permit prisoners to go abroad.

Such were the steps, which, from time to time, were taken to qualify and to relieve the miseries consequent upon a practice, of which the law-givers were compelled to acknowledge the inexpediency, but which they thought more easy to correct than to repress. The repeated experience, which they had had of the impossibility of preventing the effects, so long as the cause remained unchecked, might, it may well be imagined, have opened their eyes to that convincing truth. But such was not the case: the calamities of mankind were not yet to cease; the gates of the dungeon were still left open to receive the honest and the useful citizen; the community was still to be oppressed, was still to be insulted with the occasional display of Mercy, where it had a right to demand the Justice of the legislature.

* Scobel, anno 1654, c. 25.

C H A P. VIII.

FROM the provisions contained in the act of the 8th of Elizabeth, chapter the second, it might have been hoped, for the credit both of the law and of human nature, that the flagrant grievances there complained of would no longer have prevailed, that the decency of legal practice would have equalled the good intentions of the law-makers. But far other was the case. The same enormities continued, and English citizens were still enslaved, were still insulted with impunity; until at length, immediately after the Restoration, the evil had arisen to so alarming a magnitude, that parliament found itself under the necessity of interfering, and of striking at the root of those disorders, which had not only produced such dismal effects, but which threatened to produce others still more detrimental to society. These disorders proceeded from two causes, the practice of Imprisonment for Debt, and the Usurped Jurisdictions of the different Courts of Justice; which, however distinct they might have been in their origin, concurred to invade the liberties of the subject, and to render him insecure in the enjoyment of his most estimable right. Without a due knowledge of both these sources, we shall be unable to understand with precision, either the nature of the evil which called for the interference of the first parliament of Charles the Second, or the provisions which were then made to repress it. The first of these has already been fully discussed. Of the latter we have hitherto said nothing.

thing. It is now time to enter upon the subject; to trace historically the several steps, by which the different courts of justice mutually inroached upon each other's jurisdiction; to point out the inconveniences which arose from this unconstitutional conduct, together with the various regulations, by which from time to time the legislature attempted to restrain them.

At the period of the Norman conquest, and for some time afterwards, the general administration of justice in this country was vested in one high and supreme court, denominated the *Aula Regia*, or *Aula Regis*; which consisted of the *Capitalis Justiciarius totius Angliæ*, who sat as president, of the Chancellor, the Treasurer, the Constable, the Marshal, the Seneschal, and the Chamberlains*. In this court was transacted all business both civil and criminal, and here matters relating to the revenue were regulated. Although it generally was held at Westminster, yet it was so far from being altogether stationary, that it removed with the King, and followed him in all his progresses. This circumstance was not more inconvenient or disagreeable to the people, than the enormous power which the Great Justiciary had acquired was to the King. To remedy these defects, and to introduce a reform equally acceptable to both parties, it was declared by the eleventh chapter of *Magna Charta*, that thenceforward the Common Pleas should not follow the court, that is, the *Aula Regis*†, but should be holden in some place certain. Accordingly we find that this alteration soon afterwards took place. The court of Common Pleas was

* *Gilb. Hist. C. P. Intro. fol. 19.*

† The words *Curia nostra*, in *Magna Charta*, are taken collectively, and include as well the Exchequer as the King's Bench, 2 *Inst.* 23 and 550.

erected in Westminster Hall in the nineteenth year of Henry the Third, and was first opened on the 6th of July, 1233*. In consequence of this dismemberment, the Aula Regia lost all cognizance of Common Pleas, that is, of all real actions, and of all actions mixed and personal. It retained however for some time the whole of its criminal and fiscal jurisdiction. But this at length being found productive of inconvenience, a farther alteration took place. The Court of Exchequer, which had formed part of this court, the special province of which was the determination of suits between the King and his debtors, and the regulation of the business of fines, forfeitures, and the like, taking advantage of the disturbed state of the kingdom, had considerably usurped upon the jurisdiction of the Common Pleas, and had presumed to take cognizance of matters which were foreign from its original institution. Such a confusion of jurisdiction was productive of so much mischief, that King Edward the First found himself under the necessity of interfering, and, by a new regulation, effectually to confine the several courts to those provinces, for which, by their nature and constitution, they were calculated. The first step which he took for this purpose was a limitation of the assumed power of the Exchequer. By the statute of Rothland, made in the tenth year of his reign, it was declared, that "certain pleas having been held in the Exchequer, which did not concern either the King or the ministers of that court, by means of which, as well the King's pleas, as the causes of his people, were unduly prorogued and impeded; no plea should thenceforward be holden or pleaded in the Exchequer, unless it should especially concern the King, or his afore said ministers." But,

* *Gilb. Hist. C. P.* *Introd. fol. 31.*

even in those early times, it was found no easy matter to prevent one court from incroaching on the jurisdiction of another. As the extension of boundaries of course induces an increase of profits, the watchful eye of the legislature must constantly be employed to prevent or to remedy abuses. Notwithstanding it was certain, that, by the common law, the Exchequer had no cognizance of Common Pleas *, and although the statute of Rothland had so recently been made, the King, very shortly after, was obliged positively to declare what course it should for the future pursue; and, by finally abolishing the Aula Regia, and by limiting the employment and jurisdiction of the several courts, to put an end to the confusion which prevailed. The Aula Regia was therefore broken to pieces, and a number of courts, adapted to particular purposes, arose upon its ruins: it was declared, that “thenceforward no Common Pleas should be holden in the Exchequer contrary to the form of the Great Charter;” and “that the Court of King’s Bench should follow the King, for the duly ordering of all such matters as should of necessity be brought before the court †.”

The three great courts of the King’s Bench, the Common Pleas, and the Exchequer, having been thus separated, we must inquire what were the constitutional limits of each, what were the particular objects upon which they could exercise their judicial power.

Two contemporary authors declare the jurisdiction of the court of King’s Bench. “Voilons,” says Britton, speaking in the person of the King, “que eux eiant conuance de amender faux judgements,

* Regist. 178. b. 4 Inst. 114.

† Art. sup. Chart. 28 Edw. I. c. 4 and 5.

“ et de terminer appeales et auters trespaffes faitz
 “ encounter nostre jurisdiction, et lour record se
 “ esteant solonque ceo que nous manderons per nostre
 “ breve.” By Fleta we are assured, that in this
 court “ *Falsa judicia & errores Justiciariorum rever-*
 “ *tuntur et corriguntur: ibidem etiam terminuntur*
 “ *brevia de appellis, et alia brevia super actionibus*
 “ *criminalibus et injuriarum contra pacem regis il-*
 “ *latarum impetrata.*” On these authorities, to which
 many others may be added, is to be founded the ex-
 tent of the legal jurisdiction of this court. It has
 cognizance of all pleas of the crown: it is impow-
 ered to correct all errors in the judicial proceedings
 of inferior courts: it is the general conservator of
 the peace of the kingdom: it may grant prohibi-
 tions: it may regulate corporations and franchises:
 it may hold pleas by original writ from the Court of
 Chancery of all trespaffes *vi & armis*, of Replevins,
 of Quare impedit, and generally of every thing
 forcibly injurious: and it has power to hold plea by
 bill for debt, and all other personal actions, against
 any officer or minister of the court (who in return
 may also implead others by bill in the aforesaid ac-
 tions) and against any one actually in the custody of
 the marshal or gaoler of the court*.

The business of the Court of Common Pleas was
 directed into a different channel. “ Voilons que
 “ justices demorgent continualment a Westminster
 “ au ailors la, ou nous voudrons ordeiner, a pleader
 “ comunes pleas solonque ceo que nous les mande-
 “ rons per nours briefs †.” By the phrase Common
 Pleas are intended all real actions, and all actions
 mixed and personal ‡; in other words, all questions
 of property, and all civil causes between man and

* 4 Inst. 71.

† Britt. fol. 2.

‡ 4 Inst. 99.

man. But this court has not, any more than the King's Bench, an original jurisdiction. It cannot regularly hold any common pleas in any kind of action, but by original writ out of the Chancery returnable into this court *, except in the case of its own officers, or of its actual prisoners, when it may proceed by bill †.

Of the limited power of the Court of Exchequer Britton expressly says ‡, that the treasurer and the barons should have “ Jurisdiction et record de choses que touchent leur office, a oier et determiner tous les causes que touchent nous debts, et auxi a nous fees, et les incident choses, sans les queux tiels choses ne purront estre tries, et que ilz eyent power a conuster de detts que lon doit a nous dettors per ou nous puissions plus tost approcher a nostre dett.” Lord Coke § divides this jurisdiction into two branches: the immediate, which comprehends all profits and benefits whatsoever due to the King; and the mediate, which includes, first, the privilege of the officers and the ministers of the court ||; secondly, the business devolved to them by the clause of *Quo minus*. This term gives name to a writ, which lies for the King's farmer or debtor, against any person indebted to him, and owes its origin to the supposition, that, by the detention of his debt, he is the less able to pay the King. It is legally to be allowed only to such persons as are actually tenants or debtors to the King. The third subdivision of the mediate jurisdiction arises from the liberty of suing in the Exchequer the prisoners of the court; as does the fourth, from the liberty of suing here all accountants to the King who have entered their accounts.

* Flet. 58.

† Gilb. Hist. C. P. fol. 3.

‡ Britt. fol. 2. b.

§ 4 Inst 112.

|| See supra stat. of Rothland.

Thus

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Thus was a line of conduct chalked out for each of these three great courts; whatever articles remained were allotted to various tribunals, of more confined, or of subordinate jurisdictions.

One of these courts of a more confined jurisdiction demands our attention. The Marshalsea Court is of high antiquity, is co-æval with the Aula Regia, and was in some respects a component part of it. Here the Steward and Marshal of the King's household presided, for the purposes of preserving the peace, and of determining particular causes, which might arise between parties belonging to the household within the verge. By the common law they were invested with a two-fold power. As a branch of the Aula Regia, they had a kind of concurrent power with the Justices of Eyre within their district, having cognizance of all pleas of the Crown, and of Common Pleas, whether real, personal, or mixed; as appears from Fleta, lib. 2. c. 2. who says, "*Habet et Rex curiam suam coram Seneschallo suo in Aula suâ, qui jam tenet locum capitalis justiciarii regis, de quo fit mentio in communi brevi de homine replegiando, qui proprias causas regis terminari consuevit, & falsum judicium ad veritatem revocare, & conquerentibus absque brevi* justiciam exhibere; cujus vices gerit in parte idem Seneschallus hospitii regis, cujus interest de omnibus actionibus contra pacem infra metas hospitii, &c. recenter illatis etiam sine brevi &c. auditis querimoniis injuriarum in aula regis audire & terminare, assumpto sibi Camerario, Hostiario, vel Marischallo Aulae, militibus, vel aliquibus eorum, si omnes interesse non possunt. — Hoc tantum excepto, quod de libero tenemento*"

* The proceedings in this court were by bill, on account of the privilege of the parties.

"intromittere

"intromittere non debet sine brevi *." This branch of their power lasted no longer than the *Aula Regia*, from which it was derived,

The second branch of their jurisdiction, by which they sat as judges of the *Marshallsea* of the King's household, was, by the common law, more limited and particular. It was restrained both with respect to the Causes of which they could take cognizance, of the Persons upon whom that cognizance would operate, and of the District to which it was circumscribed. First, as to the Causes. These were only Pleas of the Crown, and Pleas of Debt, of Covenant, and of Trespass merely *vi & armis* †. Secondly, as to the Persons. Here a distinction was made: in actions of debt and of covenant both the parties were to be of the King's household; in trespass it was only necessary that one of them should belong to it ‡. Thirdly, as to the Place. This was, as Fleta informs us §, limited to "*Infra metas hospitii continentis duodecim leucas* || in circuitu," or nearly twelve miles round the King's immediate purview.

Within these boundaries was confined the authority of this court; and by such restraint we may perceive the wisdom of our ancestors, who endeavoured in all cases, as much as possible, to reconcile the convenience of individuals with the interests of the public. The nature of our government patronized this peculiar jurisdiction, but the policy of the law prohibited an extension of its influence; abhorring the idea of an *Imperium in Imperio*, it tied up the exertion of its power, and leaving to its dominion those persons who, from their situations, were its peculiar

* See also Britt. c. 1. Bract l. 3. tr. 2. c. 1.

† 2 Inst. 548. ‡ Flet. l. 2. c. 3. § Ibid. l. 2. c. 2.

|| Leuca is a measure of land, consisting, according to some, of 1500 or 2000 paces; according to others, of 480 perches. Mon. Angl. Tom. I. pag. 313. — It was about a mile.

objects,

objects, left the rest of the nation to those courts, and to that general administration of justice, to which, as to their birth-right, they were intitled.

But the Steward and Marshal were too much interested in the extension of their jurisdiction to coincide with this judicious arrangement. In very early times they devised expedients to appropriate business to themselves, and to incroach upon the boundaries of the common law. They assumed a right of holding plea, if, in the bond or covenant, &c. mention were made of distress of the steward or marshal of the King's household, or one of them, although such bond or covenant were made out of the verge*. They took cognizance of debts and other things, where the parties were not of the King's household†. They even went so far, as, in the declaration and plea, falsely to name parties as of the King's household, who in fact did not belong to it; and then injuriously to refuse to the party aggrieved the liberty of contradicting the untrue suggestion‡.

These and similar incroachments at length arose to such a height, that King Edward the First, when he limited and new-modelled the other courts, thought them deserving of his consideration, and, in a very particular manner, corrected the prevailing abuses, and directed the future course which this court should pursue. Accordingly, by the third chapter of the Articuli super chartas||, it was thus enacted: "Concerning the authority of stewards and
" marshals, and of such pleas as they may hold,
" and in what manner, it is ordained, that hence-
" forth they shall not hold plea of freehold, neither
" of debt, not of covenant, nor of any contract
" made between the King's people; but only of
" trespass done within the house, and of other tref-

* 10 Co. 72. b.

† 10 Co. 72. b.

‡ Flet. l. 2. c. 3.

|| 28 Edw. I. ann. 1300.

" passes

“ passes done within the verge, and of Contracts and
 “ Covenants that one of the King’s house shall have
 “ made with another of the same house, and in the
 “ same house, and none other where. And they shall
 “ plead no plea of trespass, other than that which
 “ shall be attached by them before the King depart
 “ from the verge where the trespass shall be com-
 “ mitted; and shall plead them speedily from day to
 “ day, so that they may be pleaded and determined
 “ before that the King depart out of the limits of the
 “ same verge where the trespass was done. And if so
 “ be that they cannot be determined within the limits
 “ of the same verge, then shall the same pleas cease
 “ before the steward, and the Plaintiffs shall have re-
 “ course to the Common Law. And from hence-
 “ forth the steward shall not take cognizance of
 “ debts nor of other things, but of people of the
 “ same house, nor shall hold none other plea by ob-
 “ ligation made at the distress of the steward and of
 “ the marshals. And if the steward or marshals do
 “ any thing contrary to this Ordinance, it shall be
 “ holden as void.” The intention of this act was to
 restore and to confine the Marshalsea Court within its
 antient and proper boundaries*; to confirm to the
 subject those rights and liberties, to which by the
 common law he was originally intitled, and which had
 been assured to him by the Great Charter. For, al-
 though in the Great Charter † no specific mention is
 made of the Marshalsea Court, yet it is declared, that
 no freeman shall be arrested, or be imprisoned, or be
 deprived of his liberties or franchises, or shall be in
 any manner oppressed, otherwise than by the verdict
 of his equals, or by the law of the land. If therefore
 any person or any Court of Justice usurps a juris-
 diction, and by colour thereof arrests or imprisons a

* 2 Inst. 548.

† c. 29.

man, or, under pretence of any usurped authority, oppresses any man, contrary to that law, the illegality of the act will call for an exemplary punishment. There can be no doubt but that the steward and marshal had usurped a jurisdiction to which they had no right, and had, under colour of that usurpation, not only seized and disposed of the goods and chattels of many, but had even arrested and imprisoned the persons of those against whom their authority did not reach. This being an oppression under a pretence of justice, and a species of destruction abominated by the law, the statute just recited was framed to explain the twenty-ninth chapter of the Great Charter, as to the jurisdiction of the Marshalsea Court *.

Such was the situation in which these four Courts stood in the year 1300: such was the fair and equitable line marked out for each of them. The course of justice was plain and open; particular tribunals were adapted to every occasion; the legislature had done its part; and the subject might have expected that those, who were delegated to administer the laws, would have attended to its dictates. But a very short time was necessary to prove, that even those men, who were selected from the rest of their fellow-citizens, to maintain the cause of virtue and of truth, were unable to withstand the force of a temptation, which, by a gradual aberration from their duty, would lead them to a greater influence and to an increase of profits. The task of tracing the various steps, which were taken for this purpose, is not less unpleasant than it is dangerous. The opinion of mankind is ever in favour of those, whom they have been taught to look up to with reverence and with awe. Hazardous therefore is the undertaking of him, who presumes to attack a favourite and long-established

* 10 Co. 74.

notion. Stigmatized with the charge of presumption, he is often condemned before he is heard, and his arguments are pronounced to be futile by those, who perhaps condemn before a perusal, or who are interested to suppress the enquiry. The author of these pages, aware of the difficulties he has to encounter, presumes nevertheless to lay his proofs before the public. He is actuated by no motive, but that of benefiting the community of which he is a member. Should the following facts convince the candid and impartial, their approbation will become his reward. Although the Law is his Profession, the Privileges of an Englishman are his Birth-right. If he is ungrounded in his charge, he will bow submissively to the rod of correction; but, if the facts which he has to alledge will warrant the conclusion he has drawn, he will disregard the frowns of detected avarice, and the menaces of oppression.

In the prosecution of this enquiry, we propose, for the sake of avoiding confusion, to consider separately the steps which appear to have been taken by each of these four courts, for the purpose of extending a jurisdiction, to which by the common law they were not intitled, and for which no act of parliament, the only thing which can alter the common law, has given its sanction. In a deduction of this nature, it is impossible, with any degree of precision, to mark the exact moment when any of these usurpations began. Evil habits seldom appear at once in all their magnitude: by imperceptible degrees they steal upon us, and the disorder is arrived at the height of its malignity, before we perceive an alteration in our constitution. Our evidence therefore must arise from instances of the existence of the incroachment, from those steps which from time to time have been taken to check it, and from the situation in which we find ourselves at present. From a consideration of these

facts, and by a comparison of them with the original constitution, the reader will be enabled to form a just judgement of the validity of our accusation.

First then of the Marshalsea Court.

I. Within two years after the statute of the Articuli super Chartas was passed, a dispute arose between this Court and the City of London, on the following occasion. The King frequently residing near the city, inquests had been taken before the Steward and Marshal of trespass and other things done within the city, sometimes between citizens only, at other times between them and strangers, or between strangers only. To this the city of London objected; and, to settle the point, a private act was passed in the 30th year of Edward 1st, by which it was declared, that the cognizance of these matters belonged to the Steward and Marshal by reason of the verge, and that all such inquests should be taken within the City of London, and not elsewhere*. It must not hence be inferred, that this act impeached the Articuli super Chartas, or that it gave to the Marshalsea Court more authority than it had before. The purview of the act merely is, that such things done in London, the cognizance whereof belonged to that Court, should be tried within the City, and not elsewhere†.

Under these regulations the Marshalsea Court proceeded in the exercise of its authority; but not without an abuse of it. By degrees its officers ventured to trespass beyond the prescribed boundary, and its internal administration assumed a degree of tyranny, unwarranted by the constitution. In these researches of high antiquity, it is often impossible to particularize instances of oppression; we learn the existence of grievances only from the interposition of

* 10 Co. 70.

† 6 Co. 21.

the legislature. Such is the present case. In the year 1343, an act of parliament was made, by which it was enacted, that every person arrested into the Marshalsea should tell his own tale, and that the officers of that court should not pass the verge. This act is not in print, but appears on the Parliament Roll, the 17th of Edward the Third, numero 31 *. In the next year it was again declared, by the statute 18 Edward the Third, st. 2. c. 7. § 2. that the statutes made of the Steward and Marshal of the King's house, and what pleas they shall hold and determine before them in the Marshalsea, shall be holden and kept in all their points.

During the remainder of this reign, we find no further mention made of this court. We have however reason to believe that it had still laboured to extend its encroachments, from the early notice taken of them in the reign of the succeeding monarch. In the first year after his accession, a bill passed both houses, declaring, that, "of antient times the jurisdiction of
 " the Marshalsea was no other, nor had been, but of
 " felony, trespass done within the verge and after
 " their venue, and of Covenant and of Debt, due and
 " made between the King's servants and those who
 " followed the court; and that lords and others, who
 " had franchises, might have their franchises as well
 " within the verge as out of it." To which the King answered, "Let the Marshal have such jurisdiction as
 " before this time hath been reasonably used; and if
 " any will plead in special, let him complain to the
 " Steward of the King's house, and right shall be
 " done him." This, though it be not an act of parliament, is yet a good declaration of the law by both houses of parliament †: for it is a settled maxim, that "*contemporanea expositio est fortissima in lege* ‡."

* 3 Inst. 134. † 6 Co. 21. § 2 Inst. 11. 10 Co. 70.

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Within twelve years after the publication of this statute, the abuses committed by this court had arisen to such a height, as to occasion the loudest complaints, and the most active interposition of parliament. These produced the statute the 13 Ric. II. ft. 1. c. 3. by which it was declared, that the jurisdiction of the Steward and Marshal of the King's house should not exceed the space of twelve miles, to be computed from the lodging of the King.

After these solemn and repeated significations of the will of the legislature, can it easily be credited, that, within seventeen years after the publication of this statute, the usurpations of this court should have become so enormous, as again to require the assistance of the legislature, to check them, and to declare the extent of its jurisdiction? Extraordinary as it may appear, such nevertheless was the case: for, in the year 1406, it was found necessary to pass a law, by which it was declared, that the Marshal was intitled to hold no plea, but such as were holden by him in the reign of King Edward the First. This statute, which thus expressly limits the boundaries beyond which he was not to presume to pass, does not appear in our statute-book, but stands upon the Parliament Roll, in the 8th year of Henry the Fourth, numero 82*.

It might reasonably be imagined, that, after so explicit a declaration, this refractory court would have become more submissive, and that its conduct would have been guided by the dictates of obedience and decent observance of the laws. But there is something so alluring in an extension of authority, and in an increase of emolument, that few men have virtue to resist a temptation, by which they feel themselves so forcibly attacked. The Steward and Marshal conti-

* 3 Inst. 134.

nued to grasp at every cause which they could draw before them, however foreign it might be to their assigned jurisdiction; they made no distinction of persons, and disregarded their determined limits. Of this unjustifiable conduct we have several instances in the more early volumes of Reports. In the seventh year of Henry the Sixth, an action was brought in one of the King's courts at Westminster, upon the statute 28 Edward I. c. 3. in which the plaintiff declared against the defendant for vexatiously suing him in the Marshalsea, when neither he nor the plaintiff belonged to the King's household*. In the tenth year of the same King, an action was brought against a defendant, for having, contrary to the 28 Edward I. c. 3. sued the plaintiff upon an action of trespass in the Marshalsea Court, neither of the parties being of the King's household. This case was seriously argued; and the determination of the court was strongly against this illegal practice†.

But it was not merely an unwarranted extension of jurisdiction, of which the public complained; this grievance, of itself sufficiently vexatious, was accompanied by another infinitely more intolerable. The Steward and Marshal, when they thus brought before themselves persons over whom by law they had no power, devised a pretence, by colour of which they hoped to stifle complaints, and to tyrannize with impunity. They caused an averment to be entered upon their records, that the plaintiffs and defendants were of the King's household; and, to give a stronger sanction to this palpable fiction, they established a rule, that no person should be permitted to challenge or to except to the truth of this assertion. By these means they endeavoured to secure their usurped ju-

* Year Book, 7 Hen. VI. 30. b. M.

† Year Book, 20 Hen. VI. 13. B.

jurisdiction, and to preclude the injured parties from a possibility of procuring redress. It was, however, impossible for them so far to blind the public, as to make them forget that no less than six positive laws had been made against this illegal assumption of power; nor, however they might intimidate the individuals whom they had thus violently drawn into their court, could they prevent the voice of the public from offering up its complaints to the legislature, from bearing testimony against this daring infraction of the constitution. So strongly were these complaints enforced, that parliament, in the year 1436, found it necessary to interfere, and to add another restrictive law to those already in existence. For this purpose, it was enacted, by the statute of the 15th Henry the Sixth, c. 1. That "in every suit
 " in the Marshalsea, for the future, no defendant
 " should be estopped by such record, to say that
 " themselves, or the plaintiffs in the same record
 " specified, were not, at the commencement of the
 " plea or suit, of the King's house, according to
 " the suggestion of the record; but that the defend-
 " ants should be permitted to aver, that they them-
 " selves, or the plaintiffs, were not of the King's
 " household at the commencement of such plea or
 " suit."

The same illegal extension of jurisdiction nevertheless continued; for we find that, in the year 1453, a writ of error was brought in the court of King's Bench, between Read and Purchase, where the error assigned was, that in trespass in the Marshalsea neither of the parties belonged to the King's house. For this single assignment, the judgement of the court of Marshalsea was reversed*.

* 6 Co. 20. b. Cro. Eliz. 502.

In the year 1480, Littleton, one of the judges of the Common Pleas, informs us very ingenuously, that the Marshalsea court, even during the time when he presided in it, persisted in this prohibited usurpation. It happened, says he, when I was Steward of the Marshalsea, that an action was brought by one of the King's household against a stranger; the plaintiff recovered, and the stranger brought a writ of error. On this it was held in the court above, that the proceedings were erroneous, because the Marshal had power to hold pleas only in those cases where both the parties belonged to the King's household *.

We find no farther mention made either of this court, or of its incroachments, until the year 1541, when a very curious act of parliament † was made, for the prevention of murder and bloodshed within the King's court; and the cognizance of these offences was given to the Steward of the Marshalsea. By the 21st section of this statute it is declared, that the liberty and jurisdiction of the Marshalsea court, and the circuit of the verge, shall be, in all points, privileges, and authorities, used by the ministers and officers of the same, *in as full and as ample a manner as had theretofore been lawfully used*, for murders, felonies, offences, and all trespasses, contracts, and other suits whatsoever they might be; any thing in this act to the contrary notwithstanding. We must not imagine that this clause either did, or was intended to increase the jurisdiction of this court. The object of it was merely to ascertain those limits and that authority, to which by law it was *legally* intitled; and to prevent those limits and that authority from being affected and impeached, by the other new and extraordinary provisions contained in the act.

* Year Book, 20 Edw. IV. 16. b.

† 33 Henry VIII. c. 12.

In the year 1596, a writ of error between Baptist and Michelborn was brought in the King's Bench, upon a judgement given in the Marshalsea upon an action of trespass on the case on Trover and Conversion, within the verge, where neither of the parties was of the King's household. After much argument and due consideration, this judgement was reversed*. In this instance the Marshalsea was doubly wrong. It held a plea between persons who were not subject to its jurisdiction; and the plea itself was of a nature of which it could take no cognizance. For, by the Articuli super Chartas, they had liberty only to hold pleas of trespass *vi & armis*, and of such where in any freehold could not come in debate.

This was more fully determined in the year 1607, in the case of Jeremy Grey; where the court of King's Bench reversed a judgement given in the court of the Marshalsea, in an Action upon the Case upon Trover and Conversion; assigning for their reason, that the statute did not extend to give it a jurisdiction in this species of actions†.

Still, however, these unreasonable incroachments continued; and the confusion which had arisen between the positive law, and the practice which had usurped its place, produced so great an intricacy, that, in the year 1612, it was deemed necessary to investigate the whole subject, upon a favourable occasion which presented itself, by an action being brought in the court of Common Pleas by Richard Hall against William Stanley and others, for a false imprisonment in an action in the Marshalsea, where neither of the parties were of the King's household. After a solemn and most copious argument, the Bench

* 6 Co. 20. b. Michelborn's Case. Pasch. 38. Eliz. See Johnson v. Smith. Cro. Jac. 314.

† Hil. 5 Jac. I. Rot. 876. 10 Co. 76.

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unanimously resolved, that judgement should be given against the defendants *. Upon this case Lord Coke observes, that the jurisdiction of the Marshalsea was now settled; for that against this judgement there was no opinion in any of the books; but, on the contrary, many concurring *in terminis* with them in all the points now resolved.

The incroached jurisdiction of this court having thus finally been checked, the emoluments of its officers were materially diminished. To prevent a consequence so fatal to their interests, an application was made, in the year 1624, to King James the First, who was prevailed upon to erect, by his Letters Patent, a new Court of Record, dignified with the title of the Curia Palatii, or the Palace Court, to be held before the Steward of the household, the Marshal, and the Steward of the court, or his deputy. These Letters patent bear date on the 25th of February, in the 22d year of King James the First. To this court was given the liberty to hold plea of all personal actions whatsoever, which should arise between any parties within twelve miles of his Majesty's palace at Whitehall.

It is easy to perceive, that the erection of this new court was nothing better than a palpable infringement of the Articuli super Cartas, by the poor shift of giving to the Marshalsea, under a new name, a jurisdiction to which it never could be intitled, either by that statute, or by the law of the land. And so it was then esteemed. Great complaints were made, and several persons, against whom judgements had been given in this new court, brought writs of error before the King's Bench. Although we do not find that any decisive steps were taken in consequence of these applications, yet they appear to have alarmed

* Case of the Marshalsea, 10 Co. 68. b.

the Crown, and to have occasioned some inquiry into the legality of this extraordinary stretch of authority. About the year 1629, the attorney-general thought fit to consult with the judges of the King's Bench, on the subject of the validity of these Letters Patent. At a private meeting they were read over, and copies were directed to be made out for their more mature consideration*. This however never was done; but, instead of it, new Letters Patent to the same effect were published in the month of November of the following year.

To the consequences of these Letters Patent, the same objections remained which had been made against the former; and, in the year 1631, a writ of error was brought in the King's Bench by one Fish against one Wagstaff, upon a judgement given in the Court of the Marshalsea, by virtue of the new Patent. As the judges seemed inclined to favour this application, the King thought proper to write to them an expository letter, dated the 24th of June, 1631. To this an answer was sent, penned by Mr. Justice Whitlock, per Mandatum Curiae. They inform his Majesty, that they knew nothing of this new Patent until after it was passed, and that they were never acquainted with its penning or passing; that, as the cause of Fish and Wagstaff came before them by an ordinary course of proceeding, they could neither know the cause, nor take notice of it, nor stop it, until the record should be read in court; that then they would be exceedingly careful and circumspect, according to their oaths, that his Majesty should not suffer any prejudice or diminution in his royal power and prerogative†.

In Trinity Term, 1633, this cause was argued. The error assigned was, because in the style of the

* Rushw. 2. 104.

† Rushw. ibid.

court it was mentioned, That the court is holden by virtue of the King's Letters Patents coram such persons, "Judicibus nostris, ad audiendum et terminandum assignatis omnia placita personalia inter omnes personas, infra 12 leucas in Palatio Regis apud Westmon. et inter omnes homines de hospitio Domini Regis, tamdiu quam hospitium Domini Regis est infra 12 leucas a Palatio Westmon." And a Patent ad audiendum et terminandum omnes causas cannot be, but it ought to be only of criminal matters. For that reason the judgement was reversed*.

After this solemn decision, we feel ourselves warranted in saying, that the Palace Court is illegal. It surely therefore will behove those, who shall take upon themselves to introduce into parliament a reformation of the system of Insolvency, seriously to consider this subject. By every partial limitation or correction, the validity of the thing itself is necessarily confessed; and we have already had sufficient proof, that, while the *causa mali* is permitted to continue, its consequences cannot be restrained.

II. The Court of Exchequer.

We have seen, that, by the Articuli super Chartas, no Common Pleas were to be holden in the Exchequer, but that a certain limited sphere was allotted to it. With this sphere however the officers of the court were by no means satisfied. They saw and envied the superior emoluments of the neighbouring tribunals. Hence the transition to the attempt of increasing their own was natural. They first abused the power of which they were legally possessed, and then endeavoured to extend their jurisdiction to those articles, from which they had been so formally excluded.

* Cro. Car. 318.

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In the year 1381, the abuses of this court were become so flagrant, that the legislative interference was found absolutely necessary. Grievous complaints were made by the heirs, executors, occupiers of goods and tenants of various persons, who had been impeached in the Exchequer of debts, accounts or other demands, that the officers of the court had refused to receive them, when they offered to shew or to plead for their discharge according to the law, without having express commandment by writ, or letter of the Great or Privy Seal: in consequence of which, great delay and mischief had arisen to the parties concerned, and no advantage to the King. The Barons were therefore directed to alter this improper conduct, and for the future to permit such persons to plead, and to have their reasonable discharge, without waiting for any writ or other commandment*.

It was also ordained, that greater dispatch should be used in hearing, making up and ingrossing the accounts in the Exchequer, than had theretofore been usual†. That the accounts of Nichil should be wholly put out; or that, if any such accounts ought there to remain, the accountants should be examined upon oath by the Barons, whether they should or ought to answer the King of any thing in this behalf. If it should thereupon be found that they ought not, they should be discharged from yielding other account before any auditor, the right of the King being always saved‡.

It was also greatly complained of, that, although many persons frequently had livery of their lands and tenements out of the King's hands, by judgement given for them in the King's Bench or elsewhere, and had in consequence thereof applied to the Exchequer, to

* 5 Ric. II. St. 1. c. 10.

† Ibid. St. 1. c. 12.

‡ Ibid. St. 1. c. 14.

be discharged of the accounts demanded from them upon the same tenements; yet that the officers of the court refused to discharge them, until the same records and processes should be, word by word, newly entered in the Exchequer, and new process thereupon made, to the great damage and delay of the parties, without any profit to the King. This was an admirable expedient to increase the fees of the court, and would probably have answered the intended purpose, had any bounds been set to its shameful excess. But it became at last so palpable, that the legislature thought fit to enact, that for the future, after such record should come into the Exchequer, the Remembrancer, in whose office such accounts were demandable, should immediately cause the suit to cease, by words to be entered on the indorsement of the writ, vouching the tenor of the record, without any new judgement or farther process*.

But the court of Exchequer very speedily devised a much more conclusive method of increasing its emoluments. This was by being more circumspect in its conduct, with regard to those persons who were brought before it, and, at the same time, by extending its limits to a degree equal to those of the other courts.

This court, as we have seen, had by the common law no cognizance of Common Pleas. Its objects were merely the adjustment and recovery of the royal revenue. But as all the superior courts asserted the privilege, that their officers and ministers should sue and be sued only in their several courts; so the Exchequer not only assumed the same right, but farther asserted that all the King's debtors, farmers, and accountants, were privileged to sue and implead all

* 5 Ric. II. St. 1. c. 16.

manner of persons in the same Court, into which they themselves were called; and that they were even privileged to sue and implead each other, or any stranger, in the same kind of common law actions (where the personality only was concerned) as were prosecuted only in the Court of Common Pleas*.

All this produced no small extension of jurisdiction. It was effected by the writ of *Quo minus*, which insinuated that, as debtor to the King, they were unable to discharge what they owed, by reason of the defendant's detaining from them their own debts. But this was still inadequate to the completion of their wishes; and the statutes of Rothland, and the *Articuli super Chartas*, were barriers placed in the way of a future increase of power. The ingenuity however of those who were interested in this increase soon overcame these obstacles. The mysterious phrases of Privilege and *Quo minus* were employed; and very soon, by a dexterous management of these terms, by a fortunate suggestion of privilege, any person was admitted to sue in this court as well as the King's accountant. The surmise of being debtor to the Crown became matter of form and mere words of course; whether the plaintiff was so or not, was never permitted to be controverted; solemn acts of parliament were disregarded, the law of the land was trampled under foot; the court became open to all the nation equally, and gloried in a jurisdiction fabricated by itself.

III. The Common Pleas.

As this court was originally calculated for the exclusive decision of all causes between man and man, and as this appropriation naturally brought before it a multitude of causes; it may at first sight be difficult

* Blackst. Com. b. 3. c. 4.

to account for the various and illegal steps which it took, from time to time, for the purpose of enlarging a jurisdiction of itself sufficiently ample. The real reason was this. The other superior courts, dissatisfied with the limits which had been marked out for them by the constitution, caught at every opportunity of extending them. The extension of these naturally induced an increase of profits. But in proportion as their profits increased, the emoluments of the court of Common Pleas were diminished. This was no sooner felt by the officers of that court, than they, in their turn, set every engine to work to bring back that business which had thus been spirited away, and even to make reprisals on the enemy, by laying hold of those branches of business which had originally been appropriated to them. In the course of this conflict, thus originating from private ambition and avarice, the decorum of public proceedings was but little observed; the constitution of the several tribunals was disregarded; and the rights of English citizens were contemned.

The first step, which was taken for this purpose by the court of Common Pleas, was grounded upon the distinction, of which already we have taken notice, between injuries with and without force.

In both these cases the Common Pleas enjoyed merely a delegated authority. There could not, by the common law, be any proceedings in this court without a previous original writ sued out of the Chancery. So far they were alike. The difference between them arose upon the subsequent process.

In cases of civil injuries without force the person of the defendant was secure. He might, if he had any substance, gradually be stripped of it, unless he should render obedience to the King's writs; if he had none, the law held him to be, as he really was,

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incapable of making satisfaction, and therefore all farther process ceased as ineffectual.

But in cases of civil injuries accompanied with force, a process was provided against the defendant's person, as an offender against the public peace. This, as the most summary method, became the most acceptable to the generality of mankind. A plaintiff, whose object it was to procure an immediate remedy, naturally pursued this course, which best answered his purpose. It was of little consequence to him, and probably he had never enquired, whether this species of prosecution was defensible on constitutional principles. It was enough for him, that it would lead him the soonest to the attainment of his object. It gratified also his revenge and his malice, by subjecting the body of his adversary to imprisonment. The same motives, cloathed indeed in a different garb, instigated the court of Common Pleas to countenance, nay to promote, this summary process. In proportion to the encouragement given to suitors, the number of causes would be enlarged, the fees of the officers would naturally be increased, and the price of the several places would be raised upon a purchaser.

The consequence of all this was, that the *Capias*, by which the body of the defendant was arrested, became very soon the general process. Nothing was more easy than a suggestion of trespass: the declaration of the plaintiff was therefore couched in that form. An original writ of *Pone* or *Attachment* was sued out from the Chancery, on which a *Capias* ad respondendum was made out conformable to the original writ, by which the sheriff was authorized to take and to imprison the defendant.

It is dangerous to go beyond the boundaries of propriety. However difficult it may be to continue in the path of rectitude, it is infinitely more difficult

to return to it, when once our steps have taken a contrary direction.

Nothing can more strongly exemplify the truth of this maxim, than the subsequent conduct of this court. Very shortly, after this first aberration from its constitutional limits, another, still more glaring and improper, was introduced. In order to invite a multiplicity of suitors, and to concentrate as much as possible in themselves all the consequent emoluments, they usurped a kind of original jurisdiction. It became usual for a plaintiff, in personal actions, instead of resorting to the Court of Chancery, for an original writ adapted to the nature of his complaint, to have recourse immediately to the Common Pleas, and there to sue out a *Capias*, by which the defendant, without any notice, was instantly arrested. But as the defendant might, on his appearance, make a very solid objection to this illegal and shameful transgression of the established rules of justice, a contrivance was not wanting to protect the plaintiff, and consequently to encourage others to do the like. The plaintiff, on the production of the defendant, was permitted to procure an original writ; to this a proper return was made; it was then filed with the *Custos Brevium*, and the whole antecedent proceedings were sanctified with a colour of regularity.

This novelty did not however appear in its full force at once: gradual and almost imperceptible were its gradations. Nor did it arise to its summit without opposition. Some persons, more quicksighted than the generality of mankind, not only perceived, but endeavoured to impede its dangerous progress. Of these we cannot expect to find many instances in our books. Few are so bold or so disinterested as to reveal the errors or the defects of their own profession. Where nothing of good could be said, a guarded and prudent silence has generally been ob-

served. By some accident, however, a case of this sort has slipped into one of our antient volumes of Reports. By this we find that, in the year 1442, an attorney of the Common Pleas had dared to take out a Capias as the first process, without having sued out an original. The party concerned had probably spirit enough to resent this palpable infringement of the constitution; for an attachment was issued against the attorney, upon which he was taken. His offence being proved, he was committed to the Fleet. After having been imprisoned there for a month, he was brought before the court; when the Chief Justice Newton pronounced judgement, that his name should be struck out of the roll, and that he should be disabled from ever acting again in that capacity in any of the King's courts. To the due observance of this judgement he was solemnly sworn. The feelings of the court were however so strong in his favour, every component individual was so sensible, that by condemning him he tacitly condemned himself, and that, sooner or later, his own turn might come, that, after the farce of justice had been gone through, indulgence was shewn to the culprit. His name was restored to the roll, he was re-invested with the power of practising, and his conscience was made easy by a full and formal absolution from his oath*.

In spite of such impediments, the conduct of this court continued the same. The dereliction of the common law process became even more notorious. In all civil injuries accompanied with force, if the defendant could not be found by the sheriff upon the Capias, he might return the writ with an indorsement of *Non est inventus*; the plaintiff might then sue out another writ, called a *Tessatum Capias*, into that county whither it was supposed the defendant might

* Year Book, 20 Henry VI. 37. W.

be gone. To make the process of this court still more easy and inviting to the suitors, it now became usual to sue out the Testatum Capias in the first instance. Here was a double presumption: first, that the original writ had been duly sued out; secondly, that a common Capias had regularly issued. If therefore the former single presumption was illegal, and an affront to the constitution, what opinion are we to form of this?

With one very bad consequence this practice was immediately attended. A plaintiff, who was desirous of harrassing and ruining his adversary, might sue out a Testatum Capias into any county he pleased, upon the supposition that the defendant had flown thither. As there was no limitation to this discretion, if the plaintiff meant to try his action in Cornwall, and the defendant resided in Northumberland, he might sue out his Testatum Capias into Northumberland, on the above pretence, and procure the original writ and the Capias to be returned as in Cornwall. By these means, the condition of the defendant became truly distressful. He was under a necessity of carrying his witnesses, if the cause was to be tried, from one extremity of the kingdom to the other, when the action itself might be trifling, or brought without any foundation, for the single purpose of oppression.

To administer a remedy to this grievous abuse, the legislature found itself obliged to interfere. The statute the 6th of Richard the Second, st. 1. c. 2. was passed: by which it was enacted, “to the intent
“that writs of debt and account, and all other such
“actions be henceforth taken in their counties, and
“directed to the sheriffs of the counties where the
“contracts of the same actions did rise, That if
“henceforth in pleas upon the same writs it shall
“be declared, that the contract thereof was made

“ in another county than is contained in the original writ, *incontinently the same writ shall be utterly abated.*”

This, to unprofessional men, will probably appear a decisive stroke upon the newly introduced practice. Such however was not the case. If the judges at all regarded this statute, they must have put an interpretation upon it not immediately obvious; they must have construed the words “shall be abated,” to mean “shall not be abated;” for by no other construction can their subsequent conduct be accounted for. Instead of relinquishing the cause, which would have entailed a relinquishment of profits, they introduced a practice of permitting a defendant to move the court to change the venue, upon an affidavit that the cause of action, if any, arose in the county into which the Testatum Capias was sued, and not in the county into which the original was returned. They pretended indeed that they acted thus to save the expence of the parties. But this is a very flimsy apology for permitting, first, an illegal process, and afterwards, for countenancing the direct breach of a positive act of parliament.

Notwithstanding all these ingenious contrivances, in process of time the business of the court of Common Pleas gradually decreased, until so small a proportion remained, that there was hardly enough to keep the judges and the other officers in exercise. The court of King's Bench, which had long been running a race with them for jurisdiction, had at length completely outstripped them. The Common Pleas sat idle, and had scarcely enough of business to countenance the judges in coming to Westminster every day in the term. At the Restoration, when things began to return into their ordinary channel, the chief justice, Sir Orlando Bridgeman, with a view

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of remedying this inconvenience, and of checking the King's Bench, promoted the act of parliament, of which we gave a hint at the beginning of this chapter. But before we proceed to treat of this, we must trace the progress of usurpation made by that aspiring court. We shall then have taken a view of the whole subject, and shall, in some measure, be competent to understand, and to decide upon, the merits of the legislative interference.

IV. The Court of King's Bench.

We have seen, that, by the constitution of this court, it had power to hold pleas, by original writ from the court of Chancery, of all trespasses *vi & armis*, of Replevins, of Quare Impedit, and generally of every thing forcibly injurious; and that it moreover had power to hold plea by Bill for debt, and all other personal actions, against any officer or minister of the court (who, in return, was at liberty to implead others by Bill in the same actions), and against any one actually in the custody of the Marshal of the court. At the same time it was prohibited from holding Common Pleas in any other manner.

However this distinction may meet with the approbation of the unprejudiced, it is certain that it did not content the judges or the officers of this court. They beheld with an invidious and eager eye the superior emoluments of the Common Pleas, to which had been assigned the cognizance of civil causes. To a desire of acquiring a share of those profits succeeded the attempt of obtaining it. Various were the devices which they employed; and those devices were successful.

To effect the important purposes of extending their jurisdiction, and of increasing their profits, two methods were pursued, distinct indeed in their origin,

but tending to the same point. The one was, the overthrow of the common-law process, and the establishment of an arbitrary original jurisdiction of their own in its place; the other was, the extension of the privilege, accorded by the law to the officers and the actual prisoners of the court, to all mankind indifferently. So violent an aberration from their constitutional limits was not effected at once. Like other abuses of which we have already treated, it gradually advanced, until it became sufficiently strong to bid defiance both to decency and to law.

While the antient practice was adhered to, no extension of their jurisdiction could take place. The Court of Chancery issued to them no Original Writ in any cause, of which they had not a legal cognizance; consequently, they could not sue out such original writs in Common Pleas. This, however, has not continued to be the invariable practice. The process by Original Writ from the court of Chancery is now become the foundation of part of that jurisdiction, which this court has usurped in cases of debtor and creditor.

* As the author understood, that a bill was depending in parliament, for the purpose of abolishing the practice of suing by Special Original in the King's Bench, and of exalting in its room the practice by the *Ac Etiam* clause to a pinnacle of greatness beyond the most flattering hopes of its inventors, he was particularly cautious of enlarging on this topic. He has since been informed, that the court of King's Bench has deemed it advisable to temporize with the court of Common Pleas, and to come to an agreement, that, if a plaintiff shall hereafter sue in that court by Special Original for any sum under fifty pounds, he shall pay the extraordinary costs. Whether this compromise, which clearly is illegal, will be attended with any advantage; and whether that tribunal, which so cunningly could evade a most positive act of parliament, may not also evade this private compact, is more than a prudent man would readily assert.

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Within the limits of that legal cognizance they could hold no Common Pleas. Their business, therefore, was circumscribed within boundaries, too narrow to satisfy either their ambition or their cupidity. It was necessary, for the gratification of both these passions, that those boundaries should be enlarged.

The first contrivance adopted was a dextrous management of that species of process denominated a Bill of Middlesex. As this court had constitutionally a power of determining all offences and misdemeanors, and as upon its coming into any county it immediately superseded the ordinary administration of justice by its general commissions, it carried with it into such county its own particular process. Its own particular process was by a Bill of that county in which it resided, now commonly known by the name of a Bill of Middlesex, from the court being fixed in that county. When any one therefore, against whose person or property any injury accompanied with force had been committed by any person actually within such county, applied to this court for redress, his complaint was drawn out, and entered upon the records. But an actual trespass was to be alledged, otherwise the court could not hold plea of it. After this, the Clerk of the court issued the Bill, directed to the sheriff, and commanding him to take the defendant, if he should be found in his bailiwick, and safely to keep him, so as to have him before the King, on a certain appointed day, wheresoever he might then be in England, to answer the plaintiff in a plea of trespass. This species of process was confined to the county in which the court then actually sat; for it had no immediate jurisdiction, even of offences against the peace, any where else.

If upon this Bill, the sheriff returned *Non est inventus*, the plaintiff might either have a repetition of the same process, to arrest the defendant, if he suspected him to be in the county, or a *Testatum Bill*, directed to the sheriff of that county into which it was supposed he had flown, and reciting that it was attested, that the defendant did run up and down, and secrete himself, in that county; the sheriff of which was commanded to arrest him, as the former had been by the Bill. This second process, from a technical word made use of in it, was denominated a *Latitat*.

All this however gave the court of King's Bench no cognizance of civil causes. To extend it to them, no small ingenuity was required. But when the thoughts of many men are employed upon the same point, wonderful effects are sometimes produced. This process, peculiar and limited as it was, became the main foundation of that civil jurisdiction which it has since arrogated to itself.

To perfect this great work, the second of those methods which we mentioned was employed. As soon as the defendant was arrested, either upon the Bill of Middlesex, or upon the *Latitat*, the sheriff returned the writ with an indorsement of *Cepi Corpus*. Whether the defendant was actually committed to prison, or whether, upon being served with the process, he put in bail, the court considered him in the light of a prisoner. He was deemed to be in the custody of the Marshal, and to be entitled to the privilege of the court. This privilege, as we have seen, was intended for the benefit of those who were actually in the custody of the Marshal; being already engaged in the trammels of one court, it was esteemed injurious to subject them to the vexations and expences consequent upon a removal into another.

Sufficient

Sufficient for them, it was thought, were their present evils. But a very different use was now to be made of this distinction. A liberty was given to any person, who had a cause of action against such supposed prisoner, to file his Bill against him. The court assumed the cognizance of the cause; and by these means procured a jurisdiction over all actions mixed or personal.

Originally this process could issue only on an actual trespass; and an actual imprisonment was necessary to enable the court afterwards to proceed, for civil matters, against the defendant. But now it was held, that an allegation of trespass, whether really committed or not, was sufficient. On the appearance of the defendant, this allegation was dropped as of no further use. By the service of the process he was presumed to be in the custody of the Marshal. A Bill was instantly filed against him for debt, or for any other civil matter; and the court proceeded, as if it had legally been intitled to take cognizance of the cause. Under this masque, the jurisdiction of the King's Bench grew daily more enormous. The subject was violently drawn before it; a summary process, contradictory to the constitution, and unwarranted by any statute, assumed the place of the common-law process; and, to crown the whole, the sufferers by this unwarrantable proceeding were precluded from redress, by the resolution adopted by the court of refusing to them the permission of objecting to this assumed power. A rule was laid down, and soon became the acknowledged practice, that no person should be permitted to impeach this fallacious presumption. It was held, that *in fictione juris consistit æquitas*; a maxim, however true in general, yet ridiculous when thus applied. Where is the difference, either in nature or in reason, between
equity

equity and law? Are they not originally the same? Are they not equally founded on the great divine attribute of justice? Law cannot be unjust, neither can equity; they are both intrinsically the same, and both intrinsically perfect. What is a fiction of law? Clearly not law itself; its very name imports a falsity. As law is the central point of rectitude, every aberration from it, to whatsoever side it may tend, is an approach to somewhat worse. A fiction of law therefore, being no more than something like law, and not the law itself, must be involved in this censure. There is, moreover, a material distinction between those institutions which arise from natural law, and those which owe their origin to the caprice or the interests of legislators. With regard to these, as they are liable to great imperfections, fictions may be of use; as we have an instance in the case of Common Recoveries, which were permitted to remedy the inconveniences arising from the narrow feudal views of our ancestors. But that law which is founded on nature, which springs from the primary and indefeasible rights of mankind, should be more respected. Men are not to be hanged, that jurymen may dine; nor are free English citizens wantonly to be imprisoned, the constitution of the country is not to be undermined, that the court of King's Bench may fatten on the spoils.

This process, similar in its nature to that of the Capias in the Common Pleas, like that was gradually introduced. The first instance which we meet, of its being completely established and adopted as law, was in the year 1452. A Bill of trespass was brought in the King's Bench by one David Selby, against one in the custody of the Marshal. The cause was brought to issue, and a verdict was found for the plaintiff. In arrest of judgement it was objected, that there was no record of the defendant being a prisoner of
the

the court, and that therefore the whole proceedings were void. As this objection went to the root of the incroachment, the judges were aroused. Yelverton, one of them, took upon himself to answer it, and, by a professional subterfuge, to obviate its effects. "The defendant," said he, "has now no right to assert that there is no such record; for if a man brings a Bill of debt upon damages recovered in this court, and you had pleaded an acquittance in bar, will you come afterwards and say, there is no such record? I say, No. Or if it were in attain, and the party did not demand Oyer of the record, but pleaded forward, shall he come afterwards and say, there is no such record? I say, No. The case here is the same." Whether the opinion of the reader will coincide with that of the learned judge, on the question of similarity, may be doubtful. Serjeant Yonge had however an answer ready. "If," said he, "there is no record, that the defendant was a prisoner of this court, then all that has passed has been done without warranty, and to ram non Judice. Before you proceed against any one, it behoves you to be assured that you have power over him; for if a sheriff is accepted in the Exchequer, and is discharged, and if afterwards any one files a Bill against him, the whole will be void, because, having finished his account, he is discharged; every thing therefore done afterwards is coram non Judice. So is it in this instance." "Therefore," added Serjeant Moile, "it appears that the defendant was not a prisoner of this court; for, if a man has put in bail, he cannot be deemed an actual prisoner; bail is not sufficient to constitute him such. The proceedings, therefore, are void." This reasoning the Chief Justice Forrescue answered very shortly, by saying, "it appears to me that the proceedings are valid; for although the

“ cause of his being in prison may not appear, it
 “ shall be presumed to be a good cause. It may be,
 “ he was committed for some offence done to the
 “ court, or for some other suggestion, which we have
 “ not entered of record. As to the imprisonments
 “ by this court, they shall be construed favourably,
 “ and shall be presumed to be legal. The plaintiff
 “ therefore shall have judgement, and recover da-
 “ mages *.”

Thus we see the constitutional law was overturned, and an illegal jurisdiction was established, by a decision of the very court which was to derive an advantage from the abuse. This determination, built upon an untrue suggestion, has never been contradicted by its subsequent practice, unfounded as it is in reason, opposite as it is to the known rule of law. That rule, which springs from a source higher and more sacred than the dictum of any judge, is well known; it was even the acknowledged guide of the courts in all matters which related to others, and which did not interfere with their own immediate interest. So early as the year 1256, Robert de Thorpe, the Chief Justice, in the most public and solemn manner declared, “ that inconveniences must perpetually arise, “ if a man’s own deceit shall be allowed to aid him; “ for it is a principle of law, that *Fraus et Dolus* “ *nemini patrocinatur* : no one therefore shall be al-
 “ lowed to take advantage of his own fraud †.” But what was good law for the public, was not considered as such when it interfered with an usurpation of jurisdiction. The court took upon itself the determination of its own cause : it was at the same time judge and party. The law was sacrificed to interest. The good old maxim of *Boni Judicis est ampliare*

* Year Book, 31 Hen. VI. 10. b.

† Ibid. 30. Edw. III. 32.

Iustitiam, venerated by the founders of the constitution, was exchanged for a new doctrine. *Boni Judicis est ampliare jurisdictionem* became the favourite motto of the Bench. How well the spirit of this rule has been preserved by succeeding judges, the daily experience of mankind will best prove.

Notwithstanding so violent a stretch, the usurpation of the court of King's Bench was yet imperfect. The Bill of Middlesex, used as the first process, gave them an original jurisdiction only in the county where they sat. Great delays would ensue, before the *Latitat* could reach a defendant in another county. As this was a considerable impediment in the way of those, who were disposed to encourage the operations of this court, it felt itself obliged from gratitude to these well-wishers, and from a due regard to its own interest, to level all obstacles which impeded the expedition of its new process. With this view two alterations were introduced; the one adapted to causes arising within the county, the other to causes arising elsewhere.

In causes which arose within the county, they permitted the Precept of the bill, instead of the bill itself, to issue as the first process. In foreign causes, the plaintiff was allowed to sue out a *Latitat* in the first instance, without filing his Bill, on a presumption that the Bill had been properly filed, and that the Precept had been delivered to, and had been duly returned by, the sheriff. This practice, similar to that of the *Testatum Capias* in the Common Pleas, is liable to all the same objections, and indeed to more; as the Common Pleas was only guilty of assuming an original process over matters really subject to its cognizance; whereas this court added to this offence another still greater, that of drawing within its vortex those civil causes, from the interference with which it had been precluded by the constitution.

On

On the introduction of this new practice, a difficulty very soon occurred, which, without proper management, threatened to undermine the towering edifice of usurpation, which had so artificially been erected. When judgement was obtained against a defendant, either upon a *Latitat* employed as the first process, or upon a precept of Bill issued without any Bill actually filed, he might bring his Writ of Error, and assign for error the want of a Bill filed before the awarding of process. If he did this, the judgement was inevitably reversed, the court having in such case no jurisdiction over the cause, and all the proceedings having been *coram non Judice*. To obviate the dangers of this powerful attack, a new contrivance was introduced. If a Writ of Error was brought, the court permitted the plaintiff to patch up his proceedings, by filing a Bill, and by having his precept returned. If he was expeditious enough to do this before the errors were assigned, the whole process was deemed to be valid; and the miserable defendant, who the moment before had both law and justice on his side, was now supposed to have neither. The judgement stood; the court was triumphant; and fresh litigants were invited to participate in the sweets of its summary process.

However we may by custom have grown familiar with these innovations, reflection must point out their enormity. It is no slight thing for an English citizen to be arrested and imprisoned by the unconstitutional process of a court. If our liberties are valuable, it is our duty to investigate so daring an infringement. To enable the candid reader the more readily to perceive the dangers attendant upon this incroachment on his natural rights, we will lay before him the measures which were occasionally taken by the legislature to curb it.

Parliament,

Parliament, in the year 1432, took into consideration a very serious grievance. Many of the King's liege people, it appears, had before that time been outlawed and greatly vexed and disquieted in divers suits, both in the King's Bench and in the Common Pleas; in the records of which suits the entries had been made, that the plaintiffs *oblulerunt se in propria personâ suâ*; whereas they had never appeared to such suits, nor had even any knowledge of them*. The consequences of these infamous practices are evident. To prevent them, it was enacted, by the 10 Hen. VI. chap. 4. That no Filazer, Exigenter, or other officer, should thenceforth make such entry in any suit, unless the plaintiff therein should previously appear in person before some of the justices of the court in which the plea should depend, and should be sworn upon a book, that he is the same person in whose name such suit is sued; or unless some credible person of his counsel should make such oath for him. This statute was made perpetual by the 18 Hen. VI. chap. 9. by which another mischief was also provided against. Great damages, as it was alledged, had happened as well to the King as to individuals, from a practice somewhat similar to the foregoing. It had become usual to enter in the Records of Outlawries, that the parties appeared by their attornies, where in fact the attornies had no warrant of record; in consequence of which these outlawries were reversible, and oftentimes were actually reversed. This statute therefore provided, That every attorney, who shall not have his warrant entered of record in all his suits, wherein process of Capias and Exigent is awardable, in or before the term in which the Capias shall be awarded, shall, upon conviction, forfeit forty shillings for every offence†.

* Preamble to Stat. 10 Hen. VI. c. 4.

† See further, Stat. 32 Hen. VIII. c. 30.

In the year 1444, complaints of the perjury, extortion, and oppression of sheriffs and their subordinate officers, in the execution of the process consequent upon the unlimited use of arrests, arose to such a height, that an act of parliament * was made for their restraint. By this it was provided, that sheriffs and their officers should release from prison all persons by them arrested, or who might be in their custody, by force of any Writ, Bill, or Warrant in any action personal, or by cause of Indictment of Trespass, upon reasonable sureties of sufficient persons for their appearance. Such obligations were to be made only to themselves, by the name of their office, and upon written condition: all other obligations were to be void.

This benevolence of the legislature was productive of but little advantage; and that for two reasons. Instead of going to the bottom of the evil, they applied themselves merely to the pruning of a luxuriant branch. How inadequate this conduct is to the radical cure of a constitutional disorder, we have already had occasion to observe. Besides, a constant concomitant upon all these arrests rendered it impossible for the subject to avail himself of this statute. It was in the power of any person, who sought the destruction of his neighbour, to mark his process with so enormous a sum as to render a defendant unable to procure bail; for it is no more difficult for a bad man to swear to a large sum than to a small. But admitting that he could find friends able and willing to answer for his appearance to such an amount, another difficulty presented itself. It was become a practice for sheriffs, under the specious pretence of securing themselves from any risque which might ensue from releasing a defendant from

* 23 Henry VI. c. 9.

prison, to require the sureties in the bond to stipulate for payment of double the sum expressed in the writ. Such a requisition amounted almost to a prohibition. The good intention of the law-makers was absolutely frustrated; the russian ministers of justice laughed at the unavailing statute, and the doors of the dungeon were still shut upon the captive citizen.

The operation of this law having thus proved abortive, the court of King's Bench proceeded in its course, and exulted in the prolongation of its hour of insolence. All civil causes were violently drawn before it; the greatest encouragement was given both to suitors and to attornies, by a connivance in abuses the most shameful and the most disgraceful to our national character. In the year 1565, we are told by the voice of parliament, that it was become usual for persons of their malicious minds, and without any just cause, to procure their fellow subjects to be greatly molested and troubled, by attachments and arrests made of their bodies by process of *Latitat* sued out of the King's Bench; that, when the parties so arrested and attached were produced to answer the actions brought against them, very frequently no declaration or matter was laid against them, to which they might make answer; by means of which the defendant was maliciously put to great charges and expences, without any just or reasonable cause; for which he could not have any costs or damages awarded to him, as a compensation for such vexation and trouble*.

By the same authority we are informed of a still greater grievance. It was become a practice for malicious men to cause those, whom they wished to distress or to ruin, to be arrested, not at their own suit (for there, notwithstanding the connivance of the

* Preamble to 8 Eliz. c. 2.

court, they might apprehend some danger), but at the suit, either of some person who had no real existence, nor of some one who had no cause of action, and who was unconscious of this illicit abuse of his name &c. By this deceit they were perfectly secure, and the defendant was undone.

These enormities were attempted to be checked by the legislature, as we have before seen †; but they will continue to be a reproach to the Court of King's Bench, and a disgrace to its judges, so long as the records of the kingdom shall remain, so long as Englishmen shall execrate the destroyers of their primary rights.

Notwithstanding these statutes, the abuses which they were intended to remedy continued, and with them the enlarged jurisdiction of this court. Almost all the business of Westminster Hall, was ingrossed by it. To the Common Pleas, so little of what had originally been allotted to it remained, that if the country attornies, who mostly belonged to that court, had not, by taking apprentices, continued a succession of such as brought their business thither, it would at length have been utterly deserted. The malice and the vengeance of plaintiffs, who caught at the easy method of holding to special bail upon Latitats, and were gratified by turning the first process (by a barbarous abuse of special bail) into an execution, which, instead of coming first, ought to have come the last, converted the King's Bench into an emporium of business and emolument ‡.

But this the Common Pleas was incited to overthrow by two most forcible reasons; the disgrace of being conquered in their contest for dominion, and the melancholy consideration of their diminished pro-

* 8 Eliz. c. 2. § 4.

† See Chap. VII.

‡ North's Life of Lord Guildford, 99.

fits. The cause of these lamented effects was obvious: on this they founded their expectations of redress. They knew that the King's Bench, having no constitutional jurisdiction over civil injuries unaccompanied with force, was obliged to have recourse to the subterfuge of issuing an ostensible process of trespass. To make that court express the true cause of action in its writs, appeared an infallible method of compelling it to abandon its incroachment. With this intent, the judges and officers of the Common Pleas exerted themselves to carry a bill through parliament, which, with the fair and captivating semblance of humanity and of patriotism, would in the end answer their purpose, and crown their wishes with success.

This famous statute, the 13th of Charles the Second, st. 2. c. 12. made its first appearance in the House of Lords on the 27th of November, 1661. It deserves our most serious attention, both from its preamble, which contains the fullest account of the mischiefs consequent on the practice which has engaged the preceding pages, and for the regulation which it introduced to prevent its continuance.

The preamble runs thus:—"Whereas by the ancient and fundamental laws of this realm, in case where any person is sued, impleaded, or arrested, by any writ, bill, or process, issuing out of any of his Majesty's Courts of Record at Westminster, in any Common Plea, at the suit of any common person, the true cause of action ought to be set forth and particularly expressed in such writ, bill, or process, whereby the defendant may have certain knowledge of the cause of the suit, and the officer who shall execute such writ, bill, or process, may know how to take security for

* Lords' Journ. 27 Nov. 1661.

“ the appearance of the defendant to the same, and
 “ the sureties for such appearances may rightly un-
 “ derstand for what cause they become engaged;
 “ And whereas there is a great complaint of the
 “ people of this realm, that, for divers years now last
 “ past, very many of his Majesty's good subjects
 “ have been arrested upon general Writs of Treipass,
 “ Quare clausum fregit, Bills of Middlesex, Latitats,
 “ and other like writs, issued out of the Courts of
 “ King's Bench and Common Pleas, not expressing
 “ any particular or certain cause of action, and there-
 “ upon kept prisoners for a long time for want of
 “ bail, bond with sureties for appearances, having
 “ been demanded in so great sums, that few or none
 “ have dared to be security for the appearances of
 “ such persons so arrested and imprisoned, although
 “ in truth there hath been little or no cause of ac-
 “ tion: And oftentimes there are no such persons
 “ who are named plaintiffs, but those arrests have
 “ been many times procured by malicious persons,
 “ to vex and oppress the defendants, or to force
 “ from them unreasonable and unjust compositions
 “ for obtaining their liberty; and by such evil prac-
 “ tices many men have been and are daily undone
 “ and destroyed in their estates, without possibility
 “ of having reparation; the actors employed in such
 “ practices having been (for the most part) poor
 “ and lurking persons, and their actings so secret,
 “ that it hath been found very difficult to make true
 “ discoveries or proof thereof.”

To remedy these so great growing evils and mis-
 chiefs, and to discourage all frivolous and unjust
 suits and causeless arrests for the future, it was en-
 acted, “ That no person arrested by any sheriff or
 “ other officer, by force or colour of any writ, bill,
 “ or process, issuing out of the King's Bench or the
 “ Common Pleas, in which the certainty or the true
 “ cause

" cause of action should not be particularly expressed,
 " and for which the defendant therein named should
 " be bailable by the statute 23 Henry VI. c. 9.
 " shall be forced or compelled to give security, or
 " to enter into bond with sureties for their appear-
 " ance at the day therein specified, in any penalty,
 " or sum or sums of money, exceeding the sum of
 " 40*l.* to be conditioned for such appearance; and
 " that all sheriffs and other officers shall let to bail,
 " and deliver out of prison, and from their custody,
 " all persons whatsoever by them arrested on such
 " writ, bill, or process, wherein the certainty or true
 " cause of action is not particularly expressed, upon
 " security in the sum of 40*l.* and no more, given for
 " their appearance. It was also further enacted, that
 " on the appearance of the defendant, such bonds
 " should be discharged; and that, if the plaintiff
 " should fail to declare against the defendant before
 " the end of the next term after appearance, he should
 " be nonsuited, and should pay costs."

Although a much more decisive remedy might
 have been applied to these disorders, had the legisla-
 ture resorted to the sources whence they flowed, had
 the process of arrest been confined to its proper ob-
 jects, and the court of King's Bench been compelled
 to retire within its constitutional limits; yet it must
 be admitted, that, by the positive words of this sta-
 tute, the grievances complained of were in a great
 measure reduced. After this act, by the then exist-
 ing process, that tribunal could entertain no common
 pleas exceeding the sum of 40*l.* a restriction which
 amounted nearly to a prohibition, and which inevi-
 tably carried all matters of consequence into the
 channel of the court of Common Pleas. The lower
 and the poorer orders of society were indeed still left
 exposed; but of these it never has been the fashion
 much to consider. Too truly has it been said, and

never could it be more truly said than in this instance, that laws, like cobwebs, are calculated to catch small flies, but to suffer the large and the strong to pass through unhurt.

So far as this statute went, it was evidently calculated to overthrow the illicit practices, and to reduce the usurped jurisdiction of this court. By the candid and unbiassed peruser, no other construction can fairly be put upon it. It was so understood by the nation, and the court itself trembled with the apprehension of its approaching downfall. One celebrated writer has, however, been pleased to think differently upon this subject. Mr. Justice Blackstone very concisely asserts, that this statute had nearly produced these effects, *without any such intention in the makers.* He does not indeed quote any authority to justify this assertion; we may therefore the more freely dispute its truth. What reasons he had for so saying, as he does not himself inform us, we shall not perhaps easily discover, if it be not too presumptuous to contradict so renowned a writer, we may doubtless do it safely, not more upon the ground of the act itself, than upon the ignorance which he has manifested of the subject on which he undertook to treat; we may perhaps be justified in adding, the wilful misrepresentation of it, to serve the purposes of a court to which he looked up, and of which he was afterwards a judge. Of his ignorance of this subject, a stronger instance will not perhaps be required than his own short mention of this act, by which it evidently appears he had not read it. If the plaintiff says they "will make an affidavit, or assert upon oath, that the cause of action amounts to ten pounds or upwards, then, in order to arrest the defendant, and make him put in substantial sureties for his appearance, called special bail, it is required by the statute 13 Car. II.

" ft. 2.

"ft. 2. c. 2. that the true cause of action should be expressed in the body of the writ or process &c."

The reader has the act before him; let him compare it with this passage, and form his own opinion. Of his wilful misrepresentation, the assertion that the legislature had no intention to oust the King's Bench of its jurisdiction, is proof sufficient. He must have known the contrary. The very author whom he quotes, in the same paragraph, North in his Life of Lord Guildford, expressly says, "*The Common Pleas thought to exclude the King's Bench, by getting an act of parliament, that none should be held to bail, unless the cause of action was expressed in the writ.*" We see by this, that the avowed purpose of the statute was to exclude the King's Bench; and with this authority before him, the learned commentator thought proper to make so contradictory an assertion.

This limitation of their jurisdiction, added to the inevitable diminution of their profits, called for the immediate attention of the judges and officers of this court. Nor was it long before their ingenuity, habituated to the refinement of an interested policy, devised a method of completely evading the operation of this statute. Acts of parliament are easily evaded. We have seen the fate of the 6th of Richard the 2d. The ingenuity of the legislature to devise restraints cannot equal the dexterity of professional men in breaking through them. A well-known Irish barrister, once said, with not less truth than humour, he should be glad to see that act of parliament through which he could not drive a coach and six. But if a single man could make this boast, what cannot the collected powers of a whole court effect? They not only drove through this act of parliament, but
 Blackst. Com. B. 2. c. 19. s. 1. laid

laid open a broad highway through the inclosures of justice, of law, and of the constitution.

The evasion which they hit upon was as follows. In all causes amounting to more than 40*l.* they annexed, to the Bill or Latitat containing the charge of trespass, this clause: "And also, to a bill of the said John Doe for an hundred pounds of debt (or whatever the real cause of action might be) according to the custom of the court of our Lord the King, before the King himself to be exhibited, &c." This clause, from its two first words, received the denomination of an *Ac Etiam*. By this device, they pretended to comply with the statute, and at the same time to retain their jurisdiction: for they asserted that the true cause was expressed; and yet, being suggested merely as a collateral charge, the supposed trespass contained in the former clause still justified the arrest*.

Such

* We are informed by Keeble, in his first volume, p. 296. pl. 133, that this contrivance first took place within a year after the statute was passed. So sensible were the officers of the King's Bench of the fatal consequences which inevitably would attend it, and so severely had they already begun to feel them. The attornies, says he, do usually avoid the late act made against General Writs of Trespass taken out of the King's Bench, and not shewing Special Causes of Action, whereby they ought not to have special bail, unless for above 40*l.* but by feigning on the Latitat, that the bail answer to the trespass counted on, and also to a bill of 100*l.* (feigned) that shall be brought against them, by colour whereof they take what bail they will.

The judges of the King's Bench were not slow in adopting this fraud of the attornies. We find in the same author, p. 598. pl. 69. that, in the very next year, they reduced it to a regular system, and adapted it to every species of actions, from the cognizance of which they were precluded by the common law. The following were then established as the rules of court for *Ac Etiams*.

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Such a contrivance not only evaded the intention of the law-makers, but defeated the purpose for which the officers of the Common Pleas had procured the act. They had flattered themselves, that the King's Bench would have been utterly deprived of all those causes which it had drawn away from them, and that at the same time they would have been unaffected by any bad consequences from the statute; for, in all original writs returnable in that court, the cause of action was always of course expressed. But these sanguine expectations soon died away. They found themselves even if possible worse than they were before; their business evaporated, and they experienced but little benefit from the abuse and execrations which, we are informed, they liberally bestowed on this new device. The Triccum in lege, to use Mr. North's phrase, carried it for the King's Bench, who permitted the losers to rail, while it ingrossed all the business, and consequently all the profits*.

In Debt, "Ac etiam billæ ipsius querentis versus prefat.
" A. Def. pro 100*l*. (not saying by contract or by obligation.)"

In Detinue, "Ac etiam pro detentione bonorum & catal-
" lorum ipsius querentis ad val. 100*l*."

In Covenant, "Ac etiam pro fractione conventionum ad
" dampnum 100*l*."

In Promise, "Ac etiam pro non performance promissi-
" onum & assumptionum ad dampnum ipsius querentis ad
" val. 100*l*."

In Trover, "Ac etiam pro conversione & dispositione bo-
" norum & catalorum ipsius querentis ad val. 100*l*."

In Trespass, "Ac etiam pro captione & asportatione bo-
" norum & catalorum (vel captione & effugatione averiorum)
" ipsius querentis ad dampnum 100*l*."

This is perhaps the most bare-faced and daring incroach-
ment of jurisdiction, with which the legislature of any country
was ever insulted.

* North's Life of Lord Guildford, 99.

In this melancholy situation of things, Sir Francis North was constituted Chief Justice of the Common Pleas. He saw with concern his court shorn of its beams, and deliberated how to restore it to a level at least with its opponent. It appeared shameful to him to be thus outwitted, particularly as he could not see why they should not have as much power over the process of the law, as the King's Bench had. It struck him at length, that it would be most expedient to foil them at their own weapons, by putting in execution the same device which they had used. This, he argued, being accounted good law at one end of the hall, could not be esteemed against law at the other.

For this purpose he introduced the practice of annexing a similar clause of *Ac Etiam*, expressive of the real cause of action, to the writs of *Clausum Fregit*, upon which the *Capias* lay. By the *Clausum Fregit*, they held the defendant immediately to bail, as the other court did upon the *Latitat*; and by the *Ac Etiam*, the plaintiff, on the appearance of the defendant, might declare for debt, or any other cause of action, and might secure his judgement, by filing a proper original at any time before the assignment of Error.

There cannot be a stronger instance of the miserable state in which this court then was, than this pitiful shift to recover its lost business. By the constitution, it had the legitimate cognizance of all Common Pleas, by the proper and orderly process of original. But this it was necessitated to forego, and to adopt, instead of this honest procedure, the paltry contrivance of an illegal process. Nor was this done without much consultation and serious deliberation. The Chief Justice considered all its possible consequences, and weighed every objection. He even went so far, as to balance in his mind between the words *Nec*

non and *Ac Etiam*, which of the two phrases would be the most proper denomination for his new clause. The circumstance of making a distinction between the two courts had very nearly carried it for the *Nat non*; it sounded better he thought; his ear was captivated with the melody of *Nec nons*. But even this satisfaction he was contented to forego, rather than incur the risque of affording a subject of dispute. In captious matters, he wisely observed, it was best to give no handles. All these precautions, however, were hardly sufficient to keep the courts in peace. Their interests were at stake, and the appearance of success on either side called forth the acrimony of its rival. No sooner had these new *Ac Etiams* risen into existence, than the court of King's Bench aroused itself to oppose their progress. Lord Chief Justice Hale made no scruple of declaring, that they were an arbitrary alteration of the form of the legal process, and utterly against law. His Lordship was undoubtedly right; but he forgot that truth ought not always to be spoken. The Common Pleas were ready with their reply. They did not deny the validity of his objection, but desired to know, with what decency he could criminate the Common Pleas, for doing that which his court had done, and continued to do every day.

After this process was established, the court of Common Pleas revived, and soon became wonderfully flourishing. So immense was the increase of trials, of motions and of pleas, that, instead of a vacation in term, as had been the case, it enjoyed a perpetual term in vacation.

Upon the footing then established, the two courts have, with little variation, ever since continued. A *Divisum Imperium* seemed better than no authority

* North's Life of Lord Guildford, 100.

† Ibid. 101.

at all. But during these periods of war and of subsequent peace, very little attention was shewn to the interest of the public. The jurisdictions of the courts were amicably compromised, but it was at the expence of the constitution and of the liberties of individuals. In the partition of judicial power, as in the late partition of Poland, the sovereigns seized upon those territories which lay the most convenient for them; while the miserable defenceless inhabitants, trembling and amazed, looked up in vain for their laws, their privileges, and their liberties—

“*Quicquid delirant reges, plectuntur Achivi.*”

Having thus traced the several steps, by which the usurpations of the different courts induced the interference of parliament to moderate their abuses, and having shewn by what means that interference has since been frustrated, we will return to the point at which we left the progress of Insolvency. With one observation more it may be necessary to trouble the reader. The whole judicial power having been portioned out to the several courts, and a known and stated jurisdiction having been allotted to them, regulated by certain and established rules, which even the Crown cannot alter, and which can legally be affected only by an act of parliament, it was a matter of the highest presumption in any set of individuals, delegated to act as the judges of those courts, arbitrarily to alter or to extend that jurisdiction. Whether their intention was good, or whether it was bad, the attempt was equally illegal. If a necessity exists for such an alteration, let it take place; but let it be sanctified by law. Let the practice of our courts be founded on a constitutional ground. To wipe out the stigma with which our legal proceedings have long

long been marked *, let it be inquired whether such a confusion of jurisdiction be expedient or not. If it be, let it be properly confirmed. If it be not, let us no longer be insulted with an assumption of power, which, however a continued usage may have made it familiar to the multitude, cannot obtain respect from the accurate and impartial observer.

* Much superior to the narrow and disingenuous proceedings of these courts was the line of conduct adopted by the present Chancellor; who lately, from a conviction of the abuses which had crept into the practice of his court, in the most public and disinterested manner declared from the Bench, that "the proceedings in Chancery had run to a length, and to an expence, contrary to the genius of the Court, and to the spirit of the laws of this country: that they were become an enormous abuse, from the wanton and unnecessary charges inserted by the practitioners." Would his Lordship bestow some attention on a reformation of these abuses, of which he appears to be so conscious, the blessings of the unfortunate and the applauses of the wise would unite to form his eulogium: posterity would admire, and distant ages would be ambitious to copy a character, in which ability, disinterestedness, and public spirit would appear to struggle for pre-eminence.

C H A P. IX.

WE now enter upon the last stage of our historical deduction, and proceed to lay before the public those recent provisions, which the wisdom of the legislature has deemed adviseable, for the purpose of ascertaining the opposite interests of creditors and debtors. From the Restoration to the present time, the general aspect of things has received but little alteration. No law has been made to declare the legality of imprisonment for debt; consequently that practice has received no additional sanction. If, previous to that period, it was illegal and contradictory to the constitution and to the common law, it still continues in the same predicament, and is equally liable to reprehension.

The legislature, however, has not been idle during this time. An infinity of laws has been passed, and several important alterations in this system have been made. To consider each of these statutes separately, were to inroach too much on the attention of the reader. We will take a general view of them, under the several heads of Declaratory statutes, of Mitigating statutes, and of Insolvent acts.

I. Declaratory statutes.

By the term Declaratory Statutes, we mean such as either appear to contain an approbation of this practice, or in which an implied acknowledgement of its legality is the ostensible foundation of the new provisions. Of these statutes there are four, which particularly demand our attention.

In the Habeas Corpus act, the 31 Car. II. c. 2. § 8. it is provided, that "nothing in this act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause; but that after he shall be discharged of his imprisonment for such his criminal offence, he shall be kept in custody, according to law, for such other suit."

It possibly may be said, that the above words, "according to law," very strongly imply the legality of the practice; that it cannot be supposed the legislature would have employed so forcible an expression, had it been doubtful whether such imprisonment was or was not the law. To this various answers may be given. The object of the Habeas Corpus act was confined to arrests for criminal matters, to which alone, by the law of the land, the process of imprisonment could properly be applied. It was not in the contemplation of the legislature to extend it to civil actions; and it was merely with a view to prevent such an application of it, that this section was inserted. To conclude from these words, that the practice of imprisonment for debt is legal, is going much too far, and is straining the construction beyond what it reasonably can bear. So vague and indeterminate an expression cannot give validity to that which previously was unfounded in law; as we have seen, positive enacting clauses only, and not an accidental phrase, can make that become law which before was illegal. The makers of this act did not say that imprisonments for debt were legal. Had they gone so far, considerable stress might undoubtedly have been laid upon such a declaration. They merely provided, that this statute should not extend to civil commitments, and that persons so committed should be continued in custody according to law: that is, according to the law by which they

were confined. If there was any law to justify their detention, they would of course be properly kept in prison; if there was none, notwithstanding this statute, their imprisonment would clearly be illegal. Nor could this expression be construed to extend beyond its direct letter, or to include any species of debtors, except those who really were liable to imprisonment by law. Who these were we already have seen. To all others this prohibition could not extend; for, as there is a material distinction between law and practice, the persons imprisoned by the operation of the latter alone could not be affected by a phrase descriptive only of the former.

The second of these Declaratory Statutes is the 4th and 5th of William and Mary, c. 21. which was made for the ease of creditors, by empowering them to deliver declarations to their imprisoned debtors within a limited time; to which if the defendant should not appear and plead, the plaintiff should immediately have judgement. This act has been considered as a strong proof of the opinion entertained by the legislature on this subject. A small degree of attention must however convince us, that a conviction of the legality of the practice was by no means the ground of their interference. We need not look any farther than the first line of the preamble, which evidently shews on what foundation the whole of this superstructure was built. "Whereas by the *course of practice* in the respective Courts of Records at Westminster,"—Let the reader recollect what has already been said on the distinction between law and practice; the conclusion is so apparent, that to draw it were to trespass unnecessarily on his patience.

By the statute of 8th and 9th of William III. c. 29. it is declared, "That all prisoners, either upon contempt or mesne process, or in execution, who

“ are or shall be committed to the custody of the
 “ Marshal of the King's Bench Prison, or Warden of
 “ the Fleet, shall be actually detained within the said
 “ prisons of the King's Bench or Fleet, or the re-
 “ spective rules of the same, until they shall be from
 “ thence discharged by due course of law.” Here
 the legislature is altogether silent on the topic of le-
 gality; the provisions of the act extend no farther
 than to remedy an abuse which had crept into the
 practice. We must observe, that this is the first in-
 stance, in which the legislature takes notice of impris-
 onment on mesne process as a lawful proceeding.
 It cannot however be pretended, that such an oblique
 declaration was sufficient to stamp as lawful a practice
 originating from abuse, and unsanctified by any par-
 liamentary authority.

The fourth of these Declaratory Acts is the 1st of
 Ann. st. 2. c. 6. which contains provisions of the same
 nature as those of the preceding statute, and equally
 extends to persons committed on mesne process.
 Thus it is that custom gives consistency to abuses.

II. Mitigating Statutes.

These acts, in some degree, partake of the nature of
 those which we have just considered, as they appear
 to presuppose the legality of imprisonment for debt;
 but they differ from them materially in their object,
 which invariably tends to diminish the inconveniences,
 and to alleviate the miseries arising from the esta-
 blished practice.

The length to which this practice had been car-
 ried, and the intolerable grievances consequent upon
 it, made it impossible for the legislature to delay its
 interference, or not to check those evils which openly
 threatened the very existence of society. Had parli-
 ament been actuated by any settled principles of
 action, when it entered upon this important task, the

grievances in question would probably have been terminated. Unhappily for humanity and for the constitution, this was not the case. It was not inquired, whether the practice was consonant to the law. The dominion of prejudice was suffered to continue, and a string of statutes received the legislative sanction, as unfruitful of beneficial consequences, as they were destitute of wise and legal principles.

The first of these statutes, the 12th of George the First, c. 29. was made to prevent frivolous and vexatious arrests. By this it is enacted, "that no person shall be held to special bail, upon any process issuing out of any superior court, where the cause of action shall not amount to the sum of ten pounds or upwards; nor out of any inferior court, where the cause of action shall not amount to the sum of forty shillings or upwards; but, in both these cases, the defendant shall personally be served with a copy of the process: if he shall not appear at the return of the process, or within four days after, the plaintiff shall be at liberty to enter a common appearance, or to file common bail for the defendant, and to proceed thereon. In cases where the cause of action shall amount to ten pounds, or forty shillings, or upwards, the plaintiff shall make his affidavit thereof; and the sum mentioned in the affidavit shall be indorsed on the back of the writ or process, for which, and for no more, bail shall be taken. If no such affidavit shall be made, the plaintiff shall not be at liberty to arrest the defendant."

To this act, specious and humane as it may appear, there are two objections, which perhaps may be conceived to carry some weight. The practice of imprisonment for debt must either have been legal or illegal. If it was illegal, no creditor ought to have been

been permitted to exercise it. If it was legal, every creditor, whatever might be the amount of his demand, clearly had a right to restrain the liberty of his debtor. This act therefore must be liable to one of these cases; in either way it will be found defective. If the law was in favour of debtors, the legislature ought to have vindicated their rights *in toto*: if it was in favour of creditors, it was a species of injustice to exclude a part from that right to which all were intitled. Again, how are we to consider this distinction between superior and inferior courts? Is it not contradictory to reason, that the liberty of a citizen should in one street be estimated at ten pounds, and in another at forty shillings? Yet this is the case. The legislature did not blush to establish this distinction; and Englishmen, for half a century, revered and obeyed the phantastical dispensation.

The next statute was of a more confined nature, and shews us that government, however in general regardless of the mischiefs consequent on this practice, was sufficiently alert to prevent them, where its own interests were immediately concerned. By the 1st of George the Second, st. 2. c. 14. which was made for the purpose of encouraging seamen to enter into his Majesty's service, it was declared, that "for the future prevention, as far as might be, of any unjust or fraudulent arrests upon seamen actually belonging to any of his Majesty's ships, whereby his Majesty and the public may be deprived of their service, no such seaman shall be liable to be taken out of his Majesty's service by any process or execution, (other than for some criminal matter) unless the debt shall amount to the value of twenty pounds at the least*." "And to the end that honest creditors, who aim only at the recovery of their just debts due to them from such seamen,

* § 15.

“ may not be hindered from suing for the same,
 “ but, on the contrary, may be assisted and for-
 “ warded in their suits, and instead of an arrest,
 “ which may hurt the service, and occasion a great
 “ expence and delay to themselves, may be enabled
 “ to proceed in a more speedy and easy method; it
 “ was enacted, that the plaintiff, upon giving due
 “ notice of the cause of action, should be at liberty
 “ to file a common appearance, so as to entitle him
 “ to proceed to judgement and outlawry, and to
 “ have execution thereupon, *other than against the*
 “ *body of such seaman.*” There cannot be a stronger
 proof of the expediency of suppressing this impolitic
 practice, than is afforded to us by the above example
 of partial justice. The reasons on which it is founded
 extend equally to all orders of society. The hus-
 bandman or the mechanic are of as great consequence
 to the community as the mariner; but to the former
 no protection is given, while to the latter is afforded
 a simple and salutary process, which, by good luck,
 happened to be the law of the land.

The following year gave birth to another statute,
 the 2d of George the Second, c. 22. which originated
 in the House of Lords, for the express purpose of
 administering relief to debtors with respect to the
 imprisonment of their persons. The preamble in-
 forms us why it was made, “ Whereas many per-
 “ sons suffer by the oppression of inferior officers in
 “ the execution of process for debt, and the ex-
 “ actions of gaolers to whom such debtors are com-
 “ mitted; for remedy whereof it may be reasonable,
 “ not only to enforce the execution of the laws now
 “ in being against such oppressions and exactions,
 “ more especially several clauses in a statute made at
 “ a parliament held in the 22d and 23d years of the
 “ reign of King Charles the Second, intituled, An
 “ Act for the relief and release of poor distressed
 “ prisoners

“prisoners for debt* ; but likewise to make some
 “farther provisions for the ease and relief of deb-
 “tors, who shall be willing to satisfy their creditors
 “to the utmost of their power.”

To accomplish this good end, the statute proceeds to enact, that no sheriff, bailiff, or other officer, shall carry any person arrested by him to any tavern or other public house, or any private house, without his consent ; nor shall charge him with any sum of money for any liquor or thing whatsoever, save what he shall call for of his own accord ; nor shall take or demand any greater sum of money for such arrest or detaining than is allowed by law ; or shall exact any gratuity for keeping him out of gaol, or for lodging, or for diet, other than what shall be directed by the justices at the Quarter Sessions ; nor shall carry him to any gaol or prison within four and twenty hours from the time of the arrest †.

A printed copy of the above clause is to be given by every sheriff to his several bailiffs ; and a copy of it is to be given to every person arrested, which he is to be permitted to read, or to have read to him, before any liquor or meat shall be called for at the house to which he is conveyed ‡.

Sheriffs and gaolers are to permit persons arrested to send for and to have, at their own will and pleasure, victuals, bedding, linen, and other necessities, from what place they please ; without purloining or detaining the same, or any part thereof, and without forcing them to pay for the liberty of having them ||.

None but lawful fees are to be taken of prisoners ; a table of which is to be made out, and to be hung up in every gaol **.

* This was the first regular Insolvent Act.

† § 1.

‡ § 2.

|| § 3.

** § 4.

The courts of Westminster, every Michaelmas term, are to inquire whether such fees and rules are properly hung up and observed, and are to give eight days notice to the prisoners of such inquiry, and are to redress whatever they may find neglected or transgressed; and at assizes they are to give such inquiry in charge to the grand jury.

The judges are to hear and determine, in a summary way, the petitions of prisoners complaining of the malversations of gaolers and other officers.

They are to examine into all gifts and legacies given for the benefit of poor prisoners, and to take care that tables of such gifts and legacies be openly hung up in the several gaols, and that they be registered by the Clerks of the Peace.

Any person charged in execution for any sum of money not exceeding one hundred pounds, may exhibit a petition to the court where the process is issued, certifying the cause of the imprisonment, and a true account of his whole real and personal estate, with the dates of the securities wherein any part of it consists; the deeds or notes relating thereto, and the names of the witnesses to the same, as far as his knowledge shall extend: on which the court shall order the prisoner to be brought up, and the several creditors, at whose suit he is charged, to be summoned to appear at an appointed day; when, if any of the creditors summoned shall refuse or neglect to appear, the court shall, in a summary way, examine into the matter of the petition, and shall tender to the prisoner an oath of the above import: on his taking it, his estate shall be assigned to his creditors or to their assignees, and the prisoner shall be discharged out of custody. If the creditors shall be dissatisfied, the prisoner shall be remanded to prison, and another day shall be ap-

§ 5.

§ 6.

§ 7.

pointed

pointed for his appearance. Any creditor may detain him in prison, if he shall agree, by writing under his hand, to pay him the weekly sum of two shillings and four pence so long as he shall continue in prison at his suit. On failure of this payment, the prisoner, on application to the court, shall forthwith be discharged on taking the prescribed oath*.

A prisoner so discharged shall not again be arrested for the same debt; but the judgement against him shall remain in force, and execution may be taken out thereon, as if he never had been arrested†.

If the affects assigned over by the prisoner shall not be sufficient to satisfy the whole debt and fees, there shall be an abatement in proportion‡.

Mutual debts between the plaintiff and defendant shall be set against each other||.

Every sheriff, bailiff, or other officer, offending against this act, shall, for every offence, forfeit to the party aggrieved the sum of fifty pounds**.

It was declared, that this act should continue in force for five years, and thence to the end of the next session of parliament††.

So praise-worthy was the intention of the framers of this act, that we cannot but lament their insufficiency in two points, certainly necessary for the proper investigation of this important subject; namely, a due knowledge of the laws of this country, and an adequate sense of the privileges of free English citizens. By the first, they would have been enabled effectually to rescue from the oppressive hands of subaltern officers those, whom no law had sentenced to confinement; they would have discriminated between an improper practice, and that justice whose semblance it had usurped. By the second, they would

* § 8 and 9.

† § 10.

‡ § 12.

|| § 13.

** § 16.

†† § 14.

have been taught to estimate English liberty at a higher rate than the paltry sum of a groat a day. Can foreign nations believe, that it is in the power of any citizen of this country to sentence a fellow-citizen to perpetual bondage, by the regular payment of two shillings and four pence a week? Yet so it is. Thousands are thus confined, to gratify the malevolence or the disappointed avarice of a creditor.

In the ensuing year, some alterations were made in these provisions by the statute 3 Geo. II. c. 27. It having been found inconvenient to bring prisoners up to the courts in Westminster Hall from prisons at a distance (as had been enjoined by the former act), it was now directed, that a prisoner, after due notice to his creditors, petitioning any of the courts of Westminster whence the process issued, should, by a rule of that court, be brought to the next assizes, where the creditors should be summoned, and the cause should be heard in a summary way. An inconvenience had also arisen, from the prohibition under which officers were, of carrying persons arrested to gaol within four and twenty hours after the arrest; several persons having effected their escapes, by keeping the officers abroad all night, and by refusing to go to any house: to remedy this, it was enacted, that prisoners, refusing to go with the officer who arrested them to some house, should immediately be carried to prison.

In the year 1735, these two acts expired; but they were revived, and (except the clause in the act 2 Geo. II. c. 22. for setting mutual debts one against another) were continued until the twenty-fifth day of March, 1740, and thence to the end of the next session of parliament, by the statute 8 Geo. II. c. 24. The excepted clause, relating to mutual debts, was made perpetual. We already have had frequent occasion to observe, that where the foundation is bad, there

there will be a perpetual necessity of reparation. Such was the present case. Fraudulent Insolvents charged in execution had adopted the practice of lying in prison until all their substance was spent, and of afterwards taking the benefit of the preceding acts, when they had nothing left to deliver up to their creditors. To prevent this abuse of what was intended to be a beneficial provision, it was now declared, that no person charged in execution shall be permitted to exhibit his petition to the court whence the process issued, unless he shall so exhibit it before the end of the first term after his being charged in execution*.

By the statute 32 Geo. II. c. 28. which was passed in the year 1758, the provisions which had been contained in the 2 Geo. II. c. 22. were renewed, with the addition of several new regulations.

By the thirteenth section of this statute it was enacted, that any person charged in execution for any sum or sums of money, not exceeding in the whole one hundred pounds, being minded to deliver up to his creditor all his estate and effects, may exhibit his petition to the court whence the process issued, or into which he may have been removed by Habeas Corpus, certifying the cause of his imprisonment, and setting forth a just and true account of all his real and personal estate, together with all the charges affecting the same, and also the state of his effects at the time of his first imprisonment, and an account of all his securities, deeds, books, bonds, notes and papers, with the names and places of abode of the witnesses thereto. Before any such petition shall be received, fourteen days notice shall be given to the creditor at whose suit the prisoner shall be charged in execution, or to his attorney, with a copy of the

§ 2.

schedule

schedule he intends to deliver into court. Of the due service of this notice an affidavit must be delivered into court at the same time with the petition, and must be read openly. On receiving the petition, a rule shall be made to bring the prisoner into court, and to summon the creditor at whose suit he shall stand charged in execution. If the creditor shall appear (or, not appearing, if oath shall be made of the due service of the rule), the court shall examine into the matter of the petition in a summary way, and shall cause the prisoner to swear to the truth of his disclosure. On this, the court shall order an assignment of the prisoner's estate and effects to be made on the back of the petition to the creditor, subject nevertheless to all prior incumbrances; whereupon the creditor may take possession, and have the liberty of suing in his own name. No release of the prisoner, subsequent to such assignment, shall be pleadable in bar of such action. Upon the execution of this assignment, the court shall make a rule for the discharge of the prisoner; and the sheriff or gaoler, being served with a copy of it, shall set him at liberty. The assignee shall sell the estate and effects of the prisoner, and shall make a ratable dividend among the other creditors. If any creditor shall shew cause for disbelieving the prisoner's oath, or shall desire further time for information, the court shall remand the prisoner, and shall appoint another day for his appearance. All objections, however, to the form of the schedule shall be made on the first day. If, on the second day, the creditor shall not appear, or shall be unable to make any further discovery, the court shall make a rule for the discharge of the prisoner, unless the creditor shall insist upon his detention, and shall covenant to allow him two shillings and four-pence per week. Where more creditors than one shall insist on his detention, they shall severally

rally pay him one shilling and sixpence per week. Upon failure at any time in the payment of this allowance, the prisoner, by application to the court, shall be discharged, on his executing the assignment and conveyance. All future effects of such prisoner shall remain liable to unsatisfied debts *. Any debtor, who shall be brought up by his creditors for the purpose of surrendering his estate and effects, and shall neglect or refuse to deliver in a true schedule, or to execute an assignment or conveyance of his property, shall be transported for seven years; if he shall deliver in a false account, he shall suffer the penalties of wilful perjury. Persons who shall be convicted of perjury shall be liable to be arrested again, and to be charged in execution for the debt, and shall for ever be disabled to take any benefit from this act †. The assignees shall have power to compound with the creditors, in full discharge of their debts; and to submit disputes relating to the prisoner's estate and debts to arbitration ‡. These assignees, on proof of their misconduct or insufficiency, may be removed, and new ones may be appointed §. In cases where mutual credit may have been given, the assignees shall only state the account, and demand the balance **. No person shall be intitled to receive any benefit under this act, who shall have taken the benefit of any Insolvent Act, unless he shall have been compelled by any creditor to deliver up his estate and effects ††.

Such was the footing on which the Law of Insolvency continued for one and twenty years. At the end of that period, a young nobleman arose, whose heart felt for the miseries of his unhappy fellow-subjects; though placed himself in a state of afflu-

§ 17. † § 18. † § 21.
 § 22. ** § 23. †† § 24.
 ence

ence and security, he gave up his thoughts and exerted his abilities to vindicate the rights of meaner men. Struck with the palpable absurdity and injustice of that provision contained in the 12th of George the First, c. 29. which, distinguishing between superior and inferior courts, settled the price of English liberty in the former at ten pounds, and in the latter at forty shillings : convinced that the power of arrest and imprisonment, on mesne process issuing out of these inferior courts, where the cause of action did not amount to ten pounds, had been attended with infinite oppression, he stood forward, in the year 1779, as the advocate of freedom, and introduced a bill, which now appears as the statute 19 Geo. III. c. 70.

By this statute it was enacted, that henceforward no person shall be arrested, or be held to special bail, upon any process issuing out of any inferior court, where the cause of action shall not amount to the sum of ten pounds or upwards; but that the like copies of process shall be served, and the like proceedings shall be had thereupon in such inferior court, in all cases where the cause of action shall not amount to that sum, as are directed to be had, by the 12th of George the First, c. 29. in such inferior court, in all cases where the cause of action shall not amount to the sum of forty shillings *. The proceedings in such inferior courts, in cases where the cause of action shall amount to ten pounds or upwards, shall be the same as by the former act had been directed in causes for forty shillings or upwards †. So much of all local acts for the recovery of small debts, as might have authorized the imprisonment of defendants for sums less than ten pounds, is hereby repealed ‡. To prevent persons served with process issuing out of inferior courts, where the debt

* § 1.

† § 2.

‡ § 3.

is under ten pounds, from removing their persons and effects beyond the limits of the jurisdiction of such courts, in order to avoid execution, it is declared, that in all cases where final judgement shall be obtained in an inferior court, and where, in any court of record at Westminster, affidavit shall be made thereof, and of execution having issued against the person or effects of the defendant, and of his not being found within the jurisdiction of such inferior court, the record of such judgement shall be removed into the superior court, and writs of execution shall be issued, in the same manner as upon judgements obtained in the courts at Westminster *. It was further provided, that no execution shall be stayed, upon any writ of error, or superseas thereon to be sued, for the reversal of any judgement in any inferior court of record, where the damages are under ten pounds, unless the person bringing such writ, with two sufficient sureties, shall first enter into a recognizance, in double the sum adjudged, to prosecute his writ of error with effect, and to pay, in case of failure, the whole debt, damages, and costs †: but no cause for less than ten pounds shall be removeable into any superior court, unless the defendant shall enter into a recognizance for the payment of the debt and costs, in case judgement shall pass against him ‡.

The good sense and the humanity of these provisions demand the gratitude of every man, whom they have delivered from a state of authorized slavery. What pity is it, that the legislature did not go one step farther; that it did not eradicate the inhuman custom, which so long has disgraced this country! Should we not blush to exult in a freedom, which every moment may be converted into bondage? While personal liberty remains precarious, let us no

* § 4.

† § 5.

‡ § 6.

longer

longer boast that flattering pre-eminence. So long as by a summary process, robed in the venerable garb of law, debtors shall be liable to be torn from the bosom of their families, and to be immured in a loathsome dungeon; so long as the previous verdict of their equals shall be denied to them, and the oath of an interested party shall be deemed a sufficient ground for their arrest; fruitless will be the labours of the industrious, unavailing will be the merits of the virtuous citizen. The powerful oppressor, the insidious enemy, the rapacious usurer, are armed with a deadly weapon. In vain does the injured freeman assert his birth-right; in vain does he call upon the justice of his country, or appeal to that charter which pronounced him to be free, while his enemy can also produce His law, can also vouch the authority of the statute-book to justify his proceedings!

III. Insolvent Acts.

Nothing can be a stronger proof of the inexpediency of the practice of imprisonment for debt, than the introduction of these occasional laws, which originated merely from the humanity and compassion of the legislature, for the sufferings of miserable and helpless debtors. Whoever considers what have been the consequences of these interpositions, what an opening they have made for fraud, and how constantly they have been perverted to the most infamous purposes, must acknowledge the grievance which rendered them necessary to have been very atrocious.

They originated, as we have seen, in a proclamation of Queen Elizabeth; they were continued, on the same footing, by the two first princes of the Stuart race, and assumed the form of law in the first parliament which was held after the death of Charles the First. After the Restoration, they became customary; the first which was passed appears as the 22d and

23d of Charles the Second, c. 20. From that period to the present time, no less than twenty-four such acts have received the legislative sanction *. It appears from this, that, on an average, a fresh Insolvent Act has been passed every four years and an half. Extraordinary surely it is, that the legislative body of this country, that body which, as it is delegated to make the laws, must be supposed best to know what are the laws and rights of Englishmen, should so long have permitted the publication of these occasional statutes, which not only have perpetually been attended with the worst consequences, but have as constantly brought the framers of them into a dilemma, from which it will be difficult for them to extricate themselves. Is imprisonment for debt legal or illegal? If it is illegal, no man has a right to commit his debtor to gaol, and consequently Insolvent acts are nugatory. If it is legal, every creditor has a right so to proceed against his debtor, and Insolvent Laws must be highly unjust, as they deprive him of that privilege, to which he necessarily must have as complete a right, as he can have to any other privilege with which he has been endowed by the laws of his country. The question therefore naturally reverts to that point, which has been the foundation of the preceding enquiry. Until that point shall be determined, until the contradiction between law and practice shall be removed, we may look in vain for any consistent or salutary provisions. No

* 22 and 23 Car. II. c. 20.—30 Car. II. c. 4.—2 W. and M. St. 2. c. 15.—5 W. and M. c. 8.—7 and 8 W. III. c. 12.—1 Ann. St. 1. c. 25.—2 and 3 Ann. c. 16.—10 Ann. c. 20.—6 Geo. I. c. 22.—11 Geo. I. c. 21.—2 Geo. II. c. 20.—10 Geo. II. c. 26.—11 Geo. II. c. 9.—16 Geo. II. c. 17.—22 Geo. II. c. 34.—28 Geo. II. c. 13.—1 Geo. III. c. 17.—5 Geo. III. c. 41.—9 Geo. III. c. 26.—12 Geo. III. c. 23.—14 Geo. III. c. 77.—16 Geo. III. c. 38.—18 Geo. III. c. 52.—21 Geo. III. c. 63.

circumstance can more eminently deserve the attention of the public, no one can more seriously call for the interposition of parliament. To that public, to that parliament, we leave it.

We now conclude this historical deduction, with the mention of a case of great importance, and of equal notoriety; a case which, from the solemnity of the adjudication, the integrity of the judge, and the solidity of the reasoning, will speak more forcibly in favour of the proposition which we have laboured to establish, than any arguments which can flow from the ingenuity of the most experienced advocate. A constable, being out of his precinct, arrested a woman whose name was Anne Dekins: one Tooley took her part, and, in the heat of the affray, killed the assistant of the constable. Being indicted for murder, he alledged in his defence, that the illegality of the imprisonment was a sufficient provocation to make the homicide excuseable, and to intitle him to the benefit of his clergy. The jury, having settled the matter of fact, left the criminality of it to be decided by the judges, by returning a special verdict. The point was first argued in the King's Bench, and was thence adjourned to Serjeant's Inn, for the opinion of the twelve judges. Seven of the judges were of opinion that the prisoner was guilty of manslaughter, and he was accordingly admitted to the benefit of clergy. Here follows the opinion delivered by Chief Justice Holt in giving judgement.

"If one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people, out of compassion, much more so when it is done under colour of justice: and, when the liberty of the subject is invaded, it is a provocation to all the subjects of England.—A man ought to be concerned for Magna Charta and the laws: and, if any one against law imprison a man, he is an offender against Magna Charta *."

* Reports of Cases in Banc, Regiæ, temp. Q. Anne, 242.

C H A P. X.

BEFORE we entirely quit this subject, it may not be amiss to offer to the reader a few observations, of a different nature from those contained in the foregoing pages. Hitherto we have addressed him as an Englishman; we now address him as a man. From the understanding, let us appeal to the heart.

That the tribunals of a country, professing to believe in a Gospel of charity and of love, should not only permit, but even countenance and authorize the hourly breach of the most positive injunction contained in that Gospel, is a circumstance too strange to be credited, did not our constant experience evince it. By the command of Him whose history that Gospel records, we daily pray to Heaven for the same mercy which we shew to others; that our debts may be forgiven, as we forgive our debtors. By the authority of our courts of justice, we condemn our brother to lasting bondage and perdition, we deprive him of every blessing, and shower down horrors on his head, when he proves unable to pay the debt which our own avarice has permitted him to contract.

When we read that, in the barbarous days of a Pagan republic, a creditor was allowed to sell the body of his debtor, we pity the blindness, and reprobate the inhumanity of mankind. Let us compare this practice with our own. The untaught Roman, when he sold the body of his debtor, transferred him for a price to one who wanted his labour; he

obtained a sum of money, and recovered all or part of that which was owing to him. Nor did the debtor become an useless member of the state. He continued to labour, and perhaps laboured more than when he was at liberty. The produce of his industry indeed accrued to another; but the common stock was not diminished, the state was not impoverished by the loss of an useful citizen.

This the polished Englishman reprobates as a practice subversive of the natural rights of mankind. He denies that one citizen of a free state has a right to sell another citizen. When his debtor is insolvent, he commits him to prison, to dwell with the robber and the murderer, without a possibility of retrieving his shattered fortunes, or of procuring wherewithal to pay the debt. With liberty and with patriotism in his mouth, he condemns to the horrors of a gaol his fellow-creature, his brother, born equally free as himself, and equally as himself intitled to the light and air of Heaven. He robs the commonwealth of a member, by whose exertions it might have been benefited; and his family of a guide, a protector, and a parent.

Is he asked, "By what authority doest thou this?" His answer is ready. "I do this by the authority of a judicial writ. The ministers of justice have pronounced, that when I lent my money, or sold my goods, the vendee or receiver became bound by a tacit compact to surrender his liberty, if he should neglect or become unable to satisfy my rightful demand. His eyes were open: let him take the consequence." Is he again asked, "For what purpose hast thou thus confined thy brother?" He will reply, "To compel him to pay me that which he owes. I trusted him, in hopes of gaining by him; I lent him money, which I wanted not, that I might obtain large interest for it: I
" sold

“ sold him goods on credit, in order to extend and
 “ increase the profits of my trade. I thought him
 “ solvent, otherwise I would not have trusted him.
 “ I find him insolvent, and I will be revenged.”

Such must be the reasoning of the avaricious and merciless creditor. In the breast where interest predominates, the voice of reason seldom can be heard.

In the most solemn assembly of this nation, we have heard it asserted by one of the most distinguished law-officers, that he had frequently met with a cruel debtor, who has used his creditor most hardly, but that he had rarely, if ever, known of a cruel creditor, unless upon very great provocation indeed *. On what his Lordship thought proper to found this assertion it may be difficult to say. It could not have been on his long experience, for that must have convinced him of the contrary. The voice of parliament has repeatedly declared the contrary. The contrary is proved by the innumerable and the well-supported petitions, of which the Journals of the House of Commons are full; by every Mitigating Statute, and by every Insolvent Act. This assertion could not have originated from his Lordship's ignorance. From that the whole world will acquit him. No man better knows the law, no man so well knows the truth. To what then was this assertion owing? Why was he so anxious to white-wash creditors, and to reprobate debtors? He knew, that if the legislative mercy should ever be extended to those unhappy men, if the Great Charter and the Constitutional Rights of Englishmen should ever recover their original force, the most important and the most lucrative branch of the Usurped Jurisdiction of the court of King's Bench would necessarily fall to the ground. The liberty

* Vide Debrett's Debates of the year 1781, p. 413.

and the happiness of thousands would indeed be restored; but the golden stream, which so long has flowed through that channel, would flow no more.

Can such an assertion, originating from such a principle, and contradicted by irrefragable evidence, impose on the judgements of enlightened men, or check the sacred impulse of humanity? Shall the citizen of a free country be still liable to be driven, for a merely civil offence, to a dungeon, to banishment, to despair? Oh Nation! blind to Justice, to Religion, and to Reason! Was it for this your ancestors so often bled, so often sealed your freedom with their deaths? In vain they bled, in vain they died! 'Tis true—they limited the power of the Crown; they asserted the rights of every, the lowest, individual; they fixed your liberties on the basis of law: but they left you your avarice, your revenge, and your credulity. Your law is a law of mercy; it punishes not beyond the strength of the sufferer; it provides an adequate and just remedy for the Creditor, but looks with an eye of pity and protection on the Insolvent. Hast thou advanced thy money? Take in return the effects of thy debtor: but take not more than thou hast hazarded. What can his liberty have to do with thy debt? Shall the unfortunate be punished as a criminal? Shall the laws of thy country, and the liberties of mankind, be overthrown, to save thee from a partial loss? Small is the number of creditors, who have been benefited by the confinement of an Insolvent: countless is the multitude of debtors, whom a prison has reduced to misery, to profligacy, and to ruin.

Shall a wise and humane legislature take no cognizance of this grievance? Cannot the cries of the oppressed reach the representatives of the people? Shall they from whom, as from a pure fountain, the
clear

clear and impartial course of justice ought to flow, be unmoved by the miseries of their countrymen? Let the eyes of the people be opened: let them know and assert their natural rights; rights, to which they are indefeazably intitled, of which no partial law, no arbitrary decision, can deprive them.

At a time when the national strength is nearly exhausted, when the service of each individual is become essential to the defence of the community, on what principle of policy can the confinement of so many useful men be justified? Do not our armies want soldiers? do not our fleets confess the scarcity of mariners? are not the coffers of the state drained of immense sums to intice the unwilling husbandman and artisan? Unlock your prison doors, invite the citizen to fight the battles of his country. Let him go forth against the public enemy. The prayers and blessings of his innocent family will sanctify your arms.

It is a fundamental principle of legislation, that a punishment should be proportioned to the quantity of the offence. Wherever this proportion is neglected, the rights of humanity are invaded, and Tyranny usurps the throne of Justice. By the Great Charter, no man can be imprisoned but by the judgement of his equals, or by the law of the land. How great, how singularly glorious a privilege! But is the debtor, when arrested on mesne process, referred to the judgement of his equals? Is he imprisoned by the law of the land? When he is sent to gaol, there to remain perhaps for ever, is the proportion attended to between the offence of Insolvency and the term of his punishment? Why is he treated more harshly than the felon or the murderer? Our gentle law abhors perpetual imprisonment. By its humane provision, the gaols throughout the kingdom are, twice in the year at least, cleared of all felons:

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those who are guilty are condemned to punishment; the innocent are restored to society. The Insolvent is under no such fostering care. Cast into perpetual bondage, his sighs are disregarded; till an occasional Insolvent Act, or till death, arrives to terminate his woes.

But, though the state is thus blinded to its own interests, though courts of justice vindicate the oppression; cannot the voice of humanity and of truth find its way to the bosom of the Individual? As Men, as Englishmen, as Christians, it calls upon you. Who is there who is fortunate, who is happy, who aboundeth in the good things of this world? Hast thou no sensibility for the distresses of thy fellow-creature? Canst thou enjoy at liberty the blessings of life, nor feel a pang for the miseries to which thou had condemned thy debtor? If thou knowest them, thy heart must smite thee; for the day of retribution will surely come, when the God of Mercy will require an account at thy hands. If thou knowest them not, turn to the prison house. Behold the man whom thou hast torn from his weeping family. Do not the tears of his frantic wife, do not the cries of his starving babes, harrow up thy soul? Once they were happy, and kind imagination pictured to them scenes of future pleasure. The father, while he laboured for their provision, hung with parental fondness over his smiling infants, or pressed to his bosom the dear and faithful partner of his life. His toil became a pleasure; it was for them he toiled; and the public welfare by his labour was advanced. See now where he lies. His sunken cheek, his haggard eye, proclaim the misery of his soul. Shut up from liberty and day, confined with the refuse, the most abandoned of mankind, torn from all those he loved, and bankrupt in every view of life, he pines, he dies, the helpless victim of thine avarice. See where his

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wife and children wander the outcasts of society. The father's fostering hand is snatched from them. There is no one now to guide their infant steps, to train their minds to virtue and religion. Their welfare in this world is blasted ; and who can tell what may be their fate in the next ? Prostitution, infamy, disease, and death, conspire to terminate their course. The ruffian hand of delegated magistracy is upon them. Their father is guilty of poverty ; and his sin brings tenfold vengeance on their heads.

- " Want, worldly want, that hungry meagre fiend,
- " Is at their heels, and chases them in view.
- " Can they bear cold and hunger ? Can those limbs,
- " Framed for the tender offices of love,
- " Endure the bitter gripes of smarting poverty ?
- " Think thou already hear'st their dying screams ;
- " Think that thou seest their sad distracted mother
- " Kneeling before thy feet, and begging pity.
- " Think thou seest this—and then CONSULT THY
" HEART !"

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THE HISTORY OF THE

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P A R T II.

C H A P. I.

THERE is an essential difference between Insolvency and Bankruptcy. Every Bankrupt must be an Insolvent; but it does not follow that every Insolvent must be a Bankrupt. To constitute Insolvency, nothing more is necessary than an inability to discharge the legitimate demands of creditors. To constitute Bankruptcy, this inability must be attended with various indispensable circumstances. What these circumstances are, when and how this distinction arose, by what laws and in what manner this description of Insolvents is at present regulated, will be the subject of this section.

Lord Coke tells us*, that in former times both the name and the offence of Bankruptcy were unknown to an Englishman. This is undoubtedly true, and for a very obvious reason. As no one can be a

* 4 Inst. 277.

bankrupt

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bankrupt who is not a trader; where there is no trade, there can be no bankrupts. In the earlier ages of our constitution, commerce was unknown among us; the English nation was therefore at that time, as the same author observes *, of all other nations the most free from bankruptcy. In proportion as commerce flourished, this exemption became more and more confined; till, at length, the state of bankruptcy became more common in England than in any other nation. So deeply indeed has it taken root among us, that it continues to flourish, even after our commerce is diminished. The reasons of this phenomenon will appear hereafter.

That the unprofessional reader may obtain a proper knowledge of the progress and the present state of this species of insolvency, we proceed to deduce its history from the first introduction of commerce to the present time. This history naturally divides itself into two periods: the first, antecedent to the usage of the term Bankrupt; the second, after that particular description was introduced. The spirit of the legislature was in both periods the same; but the mode of exerting that spirit was very different. Whether the alteration was beneficial, or whether it may not have been attended with consequences, unforeseen indeed, but highly prejudicial, will remain for the determination of the reader.

Commerce was not in England an indigenous plant. Like all other exotics, it required great care and attention. The fostering hand of the legislature was necessary to nourish and to sustain it. Accordingly, as we have already seen, the first acts relating to trade † were all calculated to promote its secu-

* 4 Inst. 277.

† 11 Edw. I. Stat. of Acton-Burnell. 13 Edw. I. Stat. of Merchants. 27 Edw. III. Stat. de Stapulis.

rity, and to protect the interests of those foreigners, who principally carried it on. What these acts were, and what careful provisions they contained, have already been seen. Through all of them may be traced the most anxious attention to the interests of the trader. A particular mode was devised of securing to him the payment of his debts: and the antient and laudable procedure of the common law was subverted for his immediate benefit. The legislature seems even to have conceived an idea, that these merchants could not be in the wrong; so anxious were the endeavours to protect them, and so severe the regulations against their debtors. The system of commercial laws at that time presents to us a picture, very different from that which our present Bankrupt acts afford. There, every presumption was in favour of the trader: he was deemed to be honest, to be solvent; he was invested with extraordinary powers for the recovery of his debts. Here, every presumption is in favour of the creditors of the trader: new methods are devised to secure their interests, and new penalties are denounced against the fraudulent practices of the insolvent dealer.

Nor is this alteration to be wondered at. The great and apparent importance of commerce to this country was a sufficient reason for the anxiety of the legislature to establish and to protect it. But when it was thus established, the very nature of commerce made it necessary to frame laws to regulate and to restrain it. No man embarks in trade, but from a desire of becoming rich. By a fair and honest pursuit of business, a good fortune may in time be made. But, among the many who thus pursue the same objects, all are not equally honest. The opportunities of becoming suddenly rich are too various and too flattering always to be resisted. The best men may be tempted by them: dishonest
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men will eagerly embrace them. The more diffusive our commerce is, the more frequently will these opportunities occur. Where they do not, ingenuity and depravity will create them. To prevent this facility of yielding to temptation, to restrain and to defeat the enterprizes of the fraudulent trader, experience has suggested the necessity of enacting positive and severe laws. How great this necessity is, an acquaintance with these laws, and with the various devices daily practised to elude them, will readily evince. The wisdom of five centuries has been unable to exterminate the frauds of traders. In no country were there ever severer laws, or a more apparently judicious mode of carrying them into execution : but certain it is, that in no country, and at no time, were such frequent abuses and frauds common and notorious, as they are at present in England.

A very short experience indeed was sufficient to shew, that, although commerce was to be protected, the misconduct of traders was to be restrained. Those very Lombards, who nearly monopolized the trade of this country, and in whose favour the laws above mentioned had been made, were the first to prove, that, although commerce itself is highly honourable and advantageous, the conduct of those who exercise it is not always unimpeachable. The privileges they enjoyed were great ; but the fraudulent and avaricious are not easily satisfied. It soon occurred, that, if a fortune might gradually be made by upright dealing, it might more easily and more expeditiously be made, by getting possession of the property of others, and retiring beyond seas, out of the reach of their creditors. To men bent upon growing suddenly rich, to foreigners unconnected with this country, the execution of such a scheme naturally followed its conception. Many Lombards, having contracted debts, and procured money and effects, actually re-

treated from the kingdom, leaving their creditors without a possibility of redress. An evil of this nature was quickly felt; and a remedy was applied, extremely satisfactory in its nature, though perhaps, in its consequences, somewhat hard upon individuals. It was enacted, by the 25th of Edward the Third, st. 5. c. 23. that when a Lombard, who had made contracts, or had entered into obligations with his creditors, should quit the kingdom without making due satisfaction, if no known merchant of his company should engage to discharge them, that the company itself should answer for the debt. Thus was a remedy provided against this fraud. It became necessary for the company to keep a watchful eye on the conduct of its component individuals, as not only the common credit, but the common interest, was liable to suffer from private misconduct. And doubtless the advantage of this regulation was quickly experienced. Where every member of the company was liable to be affected by the knavery of his fellow-merchant, his vigilance would be constantly awake: and, as fewer opportunities could present themselves, the number of fugitive Lombards would necessarily decrease. The principle upon which this regulation was framed, is as just, as it is familiar to our law. Where many are interested to prevent an offence, that offence will probably be less frequently committed. Thus, counties may be sued for goods taken by robbers; hundreds may be obliged to pay for the damages consequent on riots. Though in these cases, the innocent are compelled to compensate for the faults of the guilty, yet may we not conclude, that robberies and riots are therefore less frequent?

To him who sits down to compose a work like the present, no circumstance can be so unpleasant or so formidable, as the necessity under which he sometimes finds himself of animadverting upon, or of disputing

disputing the doctrines laid down by those, who have already treated on the same subject. Yet were he, on these occasions, to be silent, though he might perhaps escape the charge of presumption, he would justly incur the guilt of incorrectness and timidity. While thus, which soever path he may pursue, his steps are attended with peril, the reader, whose object is information, will pardon him for taking that bolder line, which, by a candid comparison of opinions, might lead to the discovery of truth. The many public transactions in which Lord Coke was engaged, and the elaborate and voluminous works which he has left behind him, seem to have demanded a length of life, greatly beyond that period which is commonly allotted to man. Amidst the learning, with which these works are replete, we ought not to wonder that sometimes we find a blemish. *Sed non ego paucis offendar maculis.* Absolute perfection is not the portion of humanity. The greatest and the wisest are liable to error; though we may cease to wonder at ~~the~~ hero, we feel for and we love the man.

Lord Coke having said, that in former times the offence, as well as the name, of a Bankrupt was a stranger to an Englishman, proceeds to assert, that neither any complaint was preferred in Parliament, nor was any act of Parliament made against any English Bankrupt until the 34th year of Henry VIII.* Upon inspecting our statute book, we shall find, that, although indeed no laws were made against Bankrupts, specifically by that name, previous to the 34th of Henry VIII. yet that laws were made against that offence, and against those offenders, who since have been distinguished by that denomination. They indeed go further than our modern Bankrupt laws, as

* 4 Inst. 277.

they do not confine their operation to traders, but extend it to every species of insolvents. The first of these laws is the statute 50 Edw. III. c. 6. by which we find, that our ancestors were just as ready as ourselves to borrow money, which they had no intention to pay, and to take up goods and merchandize on credit, for which they had no intention to make a compensation. "Because divers people," says this statute, "inheriting divers tenements, and "borrowing divers goods in money or in merchandize, do give their tenements and chattels to their "friends, by collusion thereof to have the profits at "their will, and after do flee to the franchise of "Westminster, of St. Martin's le Grand of London, "or other such privileged places, and there do live "a great time with an high countenance of another "man's goods and profits of the said tenements and "chattels, until the said creditors shall be bound "to take a small parcel of their debt, and release "the remnant.—It is ordained and assented, that if "it be found that such gifts be so made by collusions, that the said creditors shall have execution "of the said tenements and chattels, as if no such "gift had been made." Although no mention is here made of Bankrupts, *eo nomine*, both the offences hereby noticed will, upon a comparison with our modern acts of parliament, clearly appear to be direct acts of Bankruptcy. Flying to a franchise, or taking sanctuary, with intent to defraud or hinder creditors, is so held by the 13th Eliz. c. 7. and the 1 Jac. I. c. 15. And by this latter act, it is declared, that whoever shall make, or cause to be made, any fraudulent grant or conveyance of his, her, or their lands, tenements, goods or chattels, to the intent, or whereby his, her, or their creditors shall, or may, be defeated or delayed for the recovery of their just and true debts, shall be accounted and ad-

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judged

judged a Bankrupt. By which it appears, that every transfer of property, by an insolvent debtor, to one not a creditor, though for a valuable consideration, unless in trust for creditors, is an act of Bankruptcy.

The operation of this statute of Edward III. received, soon afterwards, an additional sanction by the statute 2 Rich. II. st. 2. c. 3.

It appears extraordinary, that, when a positive law had been made to prohibit a specific offence, our ancestors should have deemed it necessary, upon a repetition or a continuance of the offence, rather to enact a new law, which in fact gave little further relief to sufferers, than to put the former law vigorously into execution. But of this procedure our ancient code affords us frequent examples. The two statutes just recited, the statute which we are about to consider, are examples. The same species of dishonesty still infecting the mutual intercourse of mankind, the legislature, by the statute 3 Hen. VII. c. 4. enacted, that “Whereas, often deeds of gift
“ of goods and chattels have been made, to the in-
“ tent to defraud creditors of their duties, and the
“ person or persons that maketh the said deed of
“ gift goeth to sanctuary, or other places privileged,
“ and occupieth and liveth with the said goods and
“ chattels, their creditors being unpaid; all deeds
“ of gift of goods and chattels made or to be made
“ of trust, to the use of that person or persons that
“ made the same deed of gift, shall be void and of
“ none effect.” The offences particularized, in this statute, are the same as those which the two former had prohibited: and the relief, as far at least as it relates to the creditors, is in effect the same. Where is the difference as to them, whether these deeds of gift were *ipso facto* void, or whether they had no effect

effect to prevent the prosecution of their just demands?

These acts, which, having never been repealed, are consequently still in force, are all which we find on record relating to this interesting subject, prior to the 34th year of Henry VIII. At that period, when the country began to recover from its intestine confusion, when the horrors of war no longer prevailed, and when the arts of peace began to flourish, with the revival and diffusion of commerce, a new system of laws, to regulate and to restrain its ministers, arose. But before we enter on this new and copious field of disquisition, it will not be uninstruative, nor perhaps unentertaining to the reader, succinctly to trace the progress which future legislators made, in restraining the abuses of secret and fraudulent conveyances of property.

Although parliament thought fit, in the year 1542, to introduce the unaccustomed phrase of Bankruptcy, and to devise particular regulations respecting that species of Insolvents; yet, as those regulations were confined merely to such persons as were in some measure engaged in trade, a great part of the nation continued unaffected by them. It required little wisdom to discover, that frauds might be committed by those who had no connection with commerce. To prevent these frauds, the interposition of law was necessary.

By the statute 13 Eliz. c. 5. (rendered perpetual by the 29 Eliz. c. 5. §. 1.) we are informed that these fraudulent alienations of property had become very frequent, and had proceeded to the length, not only of impeding and hindering the due course and execution of law and justice, but even of overthrowing all true and plain dealing between man and man, without which no commonwealth or civil society can be maintained or continued. When

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we consider that there were laws then existing directly pointed against these offences, we cannot but be surprized, that such enormities should have been suffered to arise to so formidable a height. These fraudulent transfers of property were already declared to be, not only of no effect to impede the demands of just creditors, but actually and positively void of themselves. Whether to the want of a vigorous execution of these laws, this alarming circumstance was owing, is not for us to enquire. It is enough for us to know, that, void as these acts were, it was judged necessary again to declare them void. By this statute it was therefore enacted, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit and charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgement, and execution, for the intent and purpose of delaying, hindering, or defrauding creditors and others of their just and lawful actions, suits, debts, accounts, &c. should be deemed and taken (only as against such creditors and others, their heirs, successors, executors, administrators, and assigns) to be clearly and utterly void, frustrate, and of none effect.

The very copious and comprehensive phraseology of this act left little room for future innovations; and, to render its operation still more effectual, the courts have constantly put upon it an extensive and liberal construction. But to the attempts of the necessitous and unprincipled, it is not easy to oppose an effectual barrier. Where an open opposition to a positive law would be useless, by a dextrous management it may be eluded, and its best end may
be

be defeated. With a detail of these attempts, and of the consequent interference of the legislature, we will conclude this chapter.

By the statute 27 Eliz. c. 4. made perpetual by the 39th Eliz. c. 18. § 19. it was declared that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation, of use or uses, of, in, or out of any lands, tenements or other hereditaments, made for the intent or purpose of defrauding, or deceiving such person or persons as shall or may purchase the same, or any part thereof, shall be deemed and taken, against such purchasers and their representatives, to be utterly void, frustrate, and of none effect.

Thus was the fair purchaser of an estate as completely protected from fraud, as the legislature could protect him. But another mode of alienation remained, which, as it was equally liable to deceit, required an equal interposition of law. This was the mode of alienation by Devise. It was found by experience, that even the horrors of a death-bed, and that awful moment, when, tottering on the verge of futurity, the culprit was called to render his solemn account, were not sufficient to check the course of fraud, or to stifle the emotions of cupidity. There were found men so lost to virtue, and so accustomed to deceive, as to carry their avarice and dissimulation beyond the grave. It often happened,* that persons, having, by bonds and other specialties, bound themselves and their heirs, and afterwards dying seised in fee-simple of manors, messuages, lands, tenements and hereditaments, or having power or authority to dispose of or charge the same by their will or testaments, did, to the defrauding of their just creditors, by their last wills or testaments,

* Preamble to stat. 3 Will. and Mary c. 14.

devise the same, or dispose thereof in such manner as to defeat their creditors of their just debts. To prevent this evil, and to give an adequate remedy to the injured creditors, the act of the third of William and Mary, chap. 14. made perpetual by the 6th and 7th William III. c. 14. was passed. By this it was enacted, that all wills and testaments, limitations, dispositions or appointments, of or concerning any manors, messuages, lands, tenements or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his or their decease, shall be seized in fee-simple, in possession, reversion or remainder, or have power to dispose of the same, by his, her, or their last wills or testaments, shall be deemed and taken (only as against creditors by bonds and other specialties, and their representatives) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing, to the contrary notwithstanding. And, in order to enable such creditors to recover their said debts, they were empowered to sue jointly the heir and the devisee of the obligor. And, if the heir should alienate the land before such action should be brought, he was to become answerable for the debt, to the amount of the land so aliened. The same rule was established with regard to devisees.

By these precautions was the fraudulent alienation of property restrained, and the fair purchaser and the honest creditor were protected. But while any door to iniquity was suffered to remain unclosed, the unsuspecting lender continued insecure. He, who advanced his money upon the security of landed property, would naturally conceive that, with so real and so good a pledge, his risque of losing either his principal or his interest would be inconsiderable.

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But land, already mortgaged up to its value, is worth but little. He, who advances his money on the security of such land, will find himself in a precarious situation; yet who can be sure that such situation may not be his own? To prevent fraud, is difficult: to render fraud ineffectual, is the province of a wise legislature. Let us consider how the parliament of King William provided against this dangerous abuse.

We are informed by the preamble to the statute of the 4th and 5th William and Mary c. 16. that great frauds and deceits had frequently been practised by necessitous and evil-disposed persons, who, having borrowed money, and having given judgments, statutes, and recognizances privately, for securing the repayment of the same, afterwards borrowed money from other persons, upon security of their lands, without informing the latter lender of the previous incumbrances: the consequence of which was, that such latter lender was often in danger of losing his whole money, or was forced to pay off the prior incumbrances, before he could have any benefit of his mortgage. Nor was this the only fraud committed. It was also become a practice for persons to mortgage their lands more than once, without giving notice of the first mortgage; whereby the lenders of money upon second or after-mortgages often lost their money, or were put to great charges and tedious litigations. To remedy and to prevent these crying enormities, it was, therefore, enacted, that if any person, indebted on judgement, statute, or recognizance, shall borrow any other sum or sums of money, of any other person or persons, or shall become indebted to them for any other valuable consideration, and, as a security for the same, shall mortgage his or her lands or tenements to such second or other lender, or creditor, or to any one in trust for them, or to their use, without giving due

and sufficient notice of such prior incumbrance, before the execution of such fresh mortgage, unless the mortgagor shall, within six months after notice from the mortgagee, pay off and fully discharge the said incumbrances and all interest due thereon, he shall lose his equity of redemption; and the mortgagee and his representatives shall hold and enjoy the mortgaged premises, as if the same had been absolutely purchased. The same penalty was denounced, and the same remedy was given, where any one should mortgage lands or tenements twice, without giving due notice of the first mortgage.

C H A P. II.

WE now return to that period, when the name of Bankrupt was first introduced into our law; when that great and remarkable alteration took place in our system of Insolvency, which so strongly marks the distinction between those who are, and those who are not, Traders. This distinction is the effect of a series of laws, the produce of two centuries; which by degrees have constituted a peculiar code, for the regulation of that numerous order of men, who engage in the pursuit of riches through every channel of trade or commerce.

Nor is this distinction merely titular: on the contrary, it is most real and substantial; conferring, on the one hand, extraordinary privileges and advantages; on the other hand, denouncing exemplary and severe punishments on those included within its limits. In consequence of this, the trading part of this nation, like the military and maritime bodies, is become a particular order of men, governed by special laws, enjoying distinct advantages, and subject to distinct penalties. In the midst of a regular government, they form a separate phalanx; they are protected, where others are exposed; they are free, where others are imprisoned: but they are liable to condemnation, without being heard in their defence; they are liable to confiscation, without a power of resisting; they are declared deserving of death for a merely civil offence.

In the course of this research, we shall presume to investigate both the justice and the policy of this distinction.

inction. We shall enquire how far it may be proper to draw a line between traders and other individuals. If, from the general nature of Insolvency, it shall appear reasonable, that every debtor should be equally bound to satisfy his creditor; that one debtor should not be more particularly privileged, or more severely punished, than another debtor; we shall then proceed, diffidently indeed and with submission to better and more ripened judgements, to propose such alterations and such additions to the present laws, as may either improve the existing system, or serve as a foundation to some more reasonable and efficacious code of Insolvent Laws.

The Bankrupt Laws being an incroachment upon the Common Law, they did not appear at first with either the same precision, or the same severity, with which we now behold them invested. On inspecting the eldest of these acts, it must strike us, that the legislature, feeling a present evil, endeavoured to administer a remedy, without having ascertained the magnitude of the one, or the efficacy of the other. In order to obtain a clear idea, both of the progress and of the present state of the Bankrupt system, it will be necessary to divide the subject into two periods. The first will contain the infant and imperfect state of this code; in the latter, we shall consider it in its maturity and perfection.

The first statute made relating to this offence, is the 34th and 35th of Henry the Eighth. c. 4. It is intitled "An Act against such persons as do make "Bankrupt." It cannot but appear as extraordinary, that, although it bears this title, the word Bankrupt is not to be found in any part of it, either in the preamble, or in the body of the act. Nor indeed does it seem properly to be a Bankrupt law: at least according to the idea now entertained, and that definition

dition now generally acknowledged. It is rather a collection of particular provisions, calculated to prevent the frauds of insolvents, and to protect the honest creditor.

The persons against whom this act was made are described to be "those, who, craftily obtaining into their hands great substance of other mens' goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience." How little this description tallies with the present definition of bankrupts, we shall hereafter see. It is merely general. No specific Act of Bankruptcy is required; no necessity appears that the insolvent should be a Trader. Every man who owed money, and who did not satisfy the demands of his creditors, but who, on the contrary, avoided them, was the object of its exertion. It was in fact nothing more than an extension of those acts already considered, which were calculated to check the improper conduct of debtors, and to administer relief to creditors. It prescribed a specific remedy and course of proceeding, which might more effectually prevent the commission of those enormities already prohibited.

We shall see this more plainly, if we consider the great similarity between the offences described in this act, and those provided against by the before-mentioned statutes. In these, we may recollect, the offences enumerated were collusive conveyances, and flying to privileged places, for the purpose of defrauding creditors. The objects of this act are described to be such persons as either keep house, or fly to parts unknown, or, intending to delay or defraud their creditors

ditors deceitfully by covin or collusion, suffer or cause others to recover against them any debts, goods, or other property, fraudulently, and without just cause and title so to do.

It appears then from this, that, although various provisions to prevent these practices had been devised, the practices still remained. They must have become very grievous, as the legislature appeared in earnest to administer a very forcible and unusual remedy. To preserve the creditor from a pecuniary loss, they gave a process unknown to the common law; which was an execution in the first instance; by which a few persons were vested with an enormous and conclusive power over the body, as well as over the property, of the debtor; by which the insolvent was condemned unheard, without even the form of a trial, or the intervention of a jury. So violent an incroachment upon the common course of justice could be warranted only by the real necessity of the occasion. What the occasion was, we have already seen. Whether it was sufficiently important to justify this excessive aberration from the usual path of law, this manifest contempt of the Great Charter, and of the inherent rights of Englishmen, remains to be proved. The reader must not expect to see it proved here. The page which is dedicated to the vindication of our primary and natural rights, should not be polluted with the sophisms of tyranny. It is enough for us, at present, to prove the justice of the preceding remarks, by giving a concise view of the summary process introduced by this act.

Upon a complaint in writing delivered by any creditors, aggrieved by insolvents of the description above-mentioned, authority was given to the Lord Chancellor, or Lord Keeper, the Lord Treasurer, the Lord President, the Lord Privy Seal, and others of the Privy Council, and the two Chief Justices, of whom three were to
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be a Quorum, and of which Quorum the Chancellor, or Keeper, the Treasurer, the President, or the Privy Seal, was to be one, to proceed against the debtor. We must confess, that a very proper selection of judges was made: more respectable, and probably more upright, magistrates, could not have been named. But in the very propriety of the choice, the greatest danger was contained. Had these delegates been either low men, or corrupt men, the imminent peril of our liberties would instantly have been seen. The people would have felt their danger, and would have asserted their rights. But the bitterness of the pill was disguised by the gilding. It caught the eye, and the appetite did not revolt against it. Specious, however, as this deputation might appear, and convenient as it might be thought, it operated dangerously on the constitution. It broke down the fence of our most valuable right, and laid it open to future and more violent incroachments. Under whatever masque such inroads are made, whatever present advantages they may hold out, they should always be considered as questionable, and should always be regarded with a jealous eye.

The powers given to these commissioners were very important. The first, and most material, was that by which they were authorized to take, by their wisdoms and discretions, order and directions, with the bodies of insolvents, and with their real and personal estates; and to cause the said estates and property to be searched, viewed, rented and appraised, and to make sale thereof, or otherwise to order the same, for the satisfaction and payment of the creditors, ratably, and in proportion to the quantity of their debts. To the sale of the insolvent's estates, and the subsequent partition of the produce among the creditors, it would be captious to make an objection. But we may surely pity the condition of that people;
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among whom the right of personal liberty was rated so low, as to leave the ordering and directing of the bodies of their citizens to the wisdom and discretion of any three individuals, whose determination, however capricious, unjust, or tyrannical, was final; from whose sentence there was no appeal.

These commissioners were, secondly, empowered, upon suggestion of a concealment of any part of the insolvent's estate, to send for and convent before them, by such process, ways or means, as they shall think convenient, by their discretion, the person or persons known, supposed or suspected of having in their use or custody such part of the estate, or of being indebted to the insolvent. Upon their appearance, they were authorised to examine them, as well by their oaths as otherwise, by such ways and means, as by their discretions they should think meet and convenient, for the purpose of discovering the truth of the above particulars. If, upon such examination, such person or persons should not disclose, plainly declare and shew, the whole truth of such things as he or they should be examined of; then such person or persons, upon due proof of the whole truth not having been declared, by witness, examination, or otherwise, as to the same Lords shall seem sufficient in that behalf, shall forfeit double the value of the goods, &c. so concealed; the forfeiture to be levied and recovered by the said Lords, by such ways and means as to them should seem requisite and convenient; and to be added to the produce of the insolvent's estate, and to go to increase the ratable shares of the creditors.

Without some power of preventing a concealment of the insolvent's estate, the operation of this act would doubtless have been frustrated. But of powers there are various kinds: some legal, some reasonable; some unjust, and some tyrannical. Under which description

scription we are to rank the power hereby given cannot be difficult to determine. The Lords were authorized to examine the persons suspected in two several ways: first, upon their oaths; against which no other objection can be made, than that it is contrary to the common law process, which admits of proof against suspected persons, but does not require them to criminate, or to give evidence against themselves: secondly, otherwise; a very copious and extensive phrase; which however is more precisely defined by the subsequent words, to be by such ways and means, as they, by their discretions, should think meet and convenient. What were these ways and means? What could be thought meet and convenient? By what boundaries were their discretions confined? When sufficient evidence could not be procured from the examination on oath of the party accused, were more decisive measures to be adopted? Was the victim to be tortured into confession? Was this new Inquisitorial power to be armed with the Inquisitorial Insignia? If this be not the meaning of the words, it may not perhaps be easy to affix to them any other meaning. And this tremendous power was not limited in its operation. The legislature did not say, Thus far shall ye go, and no farther. A merely fanciful and ideal boundary was opposed to this oppressive torrent; the single discretion of the authorized oppressors. At what point such discretion might begin to operate, or to what extent its operation might be carried, is at best suspicious.

The third power with which these commissioners were invested, was that of preventing and punishing fraudulent claimants upon the estate of the insolvent. For this purpose it was declared, that every such fraudulent claimant should be liable to a forfeiture of double the sum so claimed. Which forfeiture was to be levied in the same manner, and employed
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for the same purposes, as the forfeiture directed by the preceding clause.

But, as all these precautions would have been futile, had the insolvent been left at liberty to make away with his property, a fourth power was given to these commissioners, for the purpose of preventing such improper alienation. It was declared, that, if any insolvent should suffer or cause any person or persons to recover against him any debts, goods, chattels, wares, or merchandizes, without just cause and title so to do, the Lords, upon complaint thereof made to them, should have authority to convene before them such recoverer or recoverers, and, upon proof of the fraud, should order and charge all the goods and chattels so recovered towards the payment of the just debts of the creditors, after the manner and rate above described : and that such fraudulent recoveries, or any execution consequent upon them, should not be available, until such time as all the debts of the insolvent should be fully paid and satisfied.

Where the proceedings against an insolvent were so summary and so rigorous, it might sometimes happen, that he would prefer a secret and speedy flight, to an hazardous appearance before his judges. In order to prevent this, which in a great measure would have defeated the operation of this act, a fifth power was given to the commissioners ; by which they were authorized, upon complaint of the insolvent having thus withdrawn himself, to award proclamations, commanding him in the King's name to return forthwith into the kingdom, and to yield his body unto the commissioners. Upon failure of obedience within three months, he was to be deemed an outlaw ; and all his possessions were to be divided, in the manner before directed, among his creditors. The act further declared, that every person, who
should

should knowingly assist him in such escape, or in conveying any of his goods and chattels out of the kingdom, should be liable to imprisonment for such time as the commissioners should appoint, and to such fine as they should be pleased to impose upon him. Here we have another instance of a discretionary power, equally unlimited, consequently equally unjustifiable, with the former.

To all these regulations the legislature thought proper to add a provision, for the future and complete satisfaction of the creditors. By this, whatever property the insolvent might at any time acquire, was made liable to answer such part of their demands, as might remain unsatisfied after a ratable division of his effects seized; and the creditors were permitted to sue for the same at law, without meeting with any impediment from this act.

We cannot too strongly commend this provision. Without it, every other provision in the act might easily have been defeated, and the fraudulent insolvent might have triumphed in security over his baffled and injured creditors. To him who owed much, and wished to pay but little, it would not have been difficult to manage his property in such a manner, as to permit but a small portion of it to remain exposed to seizure. With this, the law must have been satisfied; with this inadequate satisfaction his creditors must have been contented. He might afterwards have resumed his station in society, a gainer by his iniquity, possessed of considerable property, and discharged from his debts. By this wise provision, such an open violation of justice was prevented; secretion and fraud were rendered of none effect; and the interests of the creditor and of the debtor were equally balanced. Why this rule is not now adhered to, is difficult to say. Until it shall be restored, every law made to protect the fair creditor,

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or to defeat the attempts of the fraudulent debtor, must be futile and inefficacious.

Such were the first regulations, which the legislature thought fit to devise, upon the introduction of the word Bankrupt into the English laws. It required no length of experience to prove their insufficiency. The evil, which they were intended to remedy, had struck too deep a root to be extirpated by so weak an instrument. The commercial constitution was universally affected. Although the disease might not then shew itself in all its terrors, no part had escaped the infection. A partial application proved of but little service. More vigorous measures were to be pursued ; more marked and decisive steps were to be taken. What these steps were, we now proceed to consider.

C H A P. III.

TO one not conversant with the Bankrupt laws, it must be a matter of curious speculation to consider, how very little effect has been produced by so immense an application of accumulated force. Statute after statute has been made; but the grievances have continued, the complaints of the kingdom are not diminished. After such repeated attempts of so many parliaments, and after so long an experience of their little efficacy, what are we to conclude? Are we to pronounce the disease too deep-rooted and too obstinate to be cured? Or are we to doubt the sufficiency of the remedy, or the ability of those who undertook to prepare it? However presumptuous it may appear, it will be the endeavour of the following pages to prove, that, tremendous as the former may be considered, it may, in a great degree at least, be weakened, if not extirpated; that the laws now existing, and the mode prescribed by those laws, are inadequate for the purpose intended.

Out of the great number of Bankrupt laws, Four statutes are particularly to be noticed: the 13th of Eliz. c. 7. the 1st of Jac. I. c. 15. the 21st of Jac. I. c. 19. and the 5th of Geo. II. c. 30. These statutes comprehend the regulations now in force, with regard to almost all matters of commercial insolvency. A careful inspection of these will be sufficient to give us an adequate idea of the present system of Bankruptcy. As this work, however, is not meant merely as a treatise upon that system, as the views of the writer extend to the consideration of its merits and

defects, and to a suggestion of alterations and improvements, it will be proper to trace the progress of legislation through every stage of this code; to attend to the complaints made, and to the remedies administered. When we shall thus have pursued it down to the present time, we shall be in some degree prepared for a candid investigation of its properties.

It did not, as we have observed, require a long time to prove, that the statute of Henry the Eighth was inadequate. In proportion to the extension of commerce, its futility became more and more apparent. Accordingly, early in the reign of Elizabeth, the extent of the danger, and the insufficiency of the remedy, strongly called for the interposition of the legislature. The trade and the navy of England had now increased to a respectable magnitude; and the number of commercial insolvents had increased with it in a very alarming proportion. The parliament, therefore, in the 13th year of that Queen, took the matter into serious consideration*. A sufficient experience having evinced that the existing regulations were productive of no advantage, but that, on the contrary, the symptoms of the disorder became every day more formidable, like a second physician called in to compensate for the ignorance or the ill success of the first, they boldly hazarded an opposite regimen, and trusted to chance for its success.

In this statute we find the first real distinction between Bankrupts and other Insolvents. A Bankrupt was here defined to be any merchant, or other person, being a natural-born subject or a denizen, using or exercising the trade of merchandize, by way of bargaining, exchange, rechange, bartry, chevizance, or otherwise, in gross or by retail, or seeking his or her trade of living by buying and selling, who should

* 13 Eliz, c. 7.

depart the realm, or begin to keep house, or otherwise to absent himself or herself, or take sanctuary, or suffer him or herself willingly to be arrested for any debt, or other thing, not justly and legally due, or should suffer him or herself to be outlawed, or yield him or herself to prison, or depart from his or her dwelling-house or houses; to the intent or purpose to defraud or hinder any of his or her creditors, being a subject born, of his or her just debt or duty.

We may gather from this definition one strong proof of the rapid increase of English commerce. In the former acts, the greatest attention, nay, the most marked partiality, had been shewn towards foreign adventurers. They had monopolized the trade of the country; and every possible advantage and security had been afforded to them. By this statute we learn, what a sudden and remarkable alteration had taken place. Instead of being indulged with peculiar privileges, foreigners were anxiously excluded from any participation of the advantages expected from this act. Its operation was exclusively confined to subjects born of the realm, or to such strangers as, by denization, had put themselves on a footing to be regarded in the same point of view.

Having thus defined the subjects upon which the act was to operate, the legislature proceeded to chalk out a new mode of procedure.

Here we observe a remarkable difference. The pageantry of ennobled judges, having produced its effect, was removed from the scene. The summary and unconstitutional process, introduced under the masque of these dignified characters, was become habitual. However extraordinary such an arbitrary incroachment on the rights of the people might at first have appeared, it now had ceased to be new, and consequently had ceased to be dreaded. Thus it is that our constitution alters, and

our liberties are infringed. The tyranny, which, if introduced at once in its full weight and real colours, would have caused our natures to revolt, when introduced gradually and with management, steals upon our reason, and lulls our apprehensions asleep. How does it behove a free and enlightened nation to guard against a new, though specious, incroachment! Where a door is once opened, it is difficult to say what intruders may enter: the fair field of liberty and happiness may be laid waste, the rights of nature, the rights of the citizen, may be annihilated, before the apprehensions of the insulted and injured people can be aroused to a sense of danger.

Whether the great men of the nation found it no longer convenient to administer the affairs of Bankrupts, or whether they had executed this important trust but badly, we cannot tell. We find however new delegates appointed. These were such wise, honest, and discreet persons, as to the Lord Chancellor should seem good, and as should be named, assigned, and appointed by his commission under the Great Seal. How many commissioners were to be appointed in each bankruptcy, does not appear. But to them, or the major part of them, was given a very great and unusual power. They were authorized to take by their discretions order and direction, with the body of the bankrupt, wheresoever he might be had, either in his house, in sanctuary, or elsewhere, as well by imprisonment of his body, as with all his lands, tenements, and hereditaments, whether copyhold, freehold in his own right, or to his use jointly with his wife or children, or whereof other persons were in trust to his use, and with his merchandizes, debts, and personal estate, wheresoever they might be found or known: and to cause the same to be searched and duly appraised, and to make sale thereof, for the true satisfaction and payment of the creditors, who
were

were to be paid ratably in proportion to their just debts.

The order and direction here prescribed was undoubtedly just and judicious, had it been restrained within any warrantable bounds. But the same evil of an unlimited discretion prevailed here, as disgraced the preceding act. It even, under this, became more alarming. Where the delegates were men of tried and acknowledged abilities and integrity, the presumption was, that their proceedings would be guided by decency and justice. Their dignity and their characters forbade the voice of calumny to whisper aught against them. But what security could be given for these subaltern appointees? Was it fitting that so large a proportion of English citizens should be subjected to the arbitrary controul of obscure and fortuitously selected individuals? Were their effects to be seized, were their estates to be sold, were their bodies to be imprisoned, at the mere discretion of temporary judges? Were they to forfeit, for an inability to discharge a debt, the choicest privileges of municipal and natural law? Yet this undoubtedly now became the case. The great mercantile part of a commercial nation was cut off from the advantages enjoyed by their fellow citizens. They became subjected to an unknown law, and were excluded from the common blessings of a trial by jury.

The only check, which this act appears to have imposed upon this unlimited discretion, was a proviso, that, upon lawful request made to them by the Bankrupt, the commissioners should make a true declaration to him of the manner in which his estates and property had been employed and disposed of, and should pay the overplus, if any, to the Bankrupt or his representative.

The remainder of the statute is taken up with provisions for getting the goods of bankrupts out

of the hands of others, for preventing bankrupts from hiding or withdrawing themselves, and for regulating estates purchased by, descended to, or conveyed away by the bankrupt.

The benefits, however, which were looked for from this act did not answer the expectations to which it had given birth. So far from matters being mended, they became even worse. In general, nothing is so fatal as an insufficient law ; as an appearance of reformation, and a reality of corruption. It was the misfortune of the time which now engages our attention, that the legislature more frequently argued, as well as acted, from effects, than from causes. We have, in the preceding pages of this work, met with frequent instances of this melancholy truth. However we may lament, we ought to be cautious in blaming this false mode of reasoning, until we can shew that even we ourselves are, at this day, completely exempt from it. A revision of our modern code will probably convince us that we are not. But as it is the most obvious, so is it the easiest way of making laws. It was in this manner the first parliament of James the First undertook the business of arranging the Bankrupt system. We will first consider the grievances which induced their interference, and then take a view of the new regulations which they thought proper to introduce.

The preamble of the act 1 Jac. I. c. 15. contains the enumeration of these grievances. Notwithstanding the law so lately made, frauds and deceits, like new diseases, continued daily to increase among such as lived by buying and selling ; the consequence of which was, the hindrance of traffic and mutual commerce, and the general hurt of the realm, by such as wickedly and wilfully became Bankrupts.

In a commercial nation these were certainly grievances of the first magnitude. To put a stop to them,

two things were necessary : an investigation of their causes, and an adequate provision for their remedy. Both these the parliament undertook, and, in both, it was equally unsuccessful.

The causes assigned were, first, that the Description of a Bankrupt was not, by the former statutes, sufficiently expressed ; secondly, that the Power given to the Commissioners, by those statutes, was not so large as was meet in such cases of deceit, to prevent the deceitful actions of bankrupts.

The great reverence, which ought to be entertained for a legislative body, must sometimes give way to a sentiment of a different nature, when we see that body manifesting an ignorance of their own acts. At the time of passing this statute, One Bankrupt Law, the 13th of Eliz. c. 7. alone existed. In this, and only this, was there any Description of a Bankrupt, or any Power delegated to Commissioners of Bankrupt. What then are we to understand by the phrase " former statutes," but that the legislature undertook to draw a conclusion, without a competent knowledge of the premises ? Can we then be surprized that this conclusion was false ?

In every case, where the framers of a law take upon themselves to separate a particular class of citizens from the general mass, by especial provisions and new penalties, they tacitly admit that these, and these only, are to be subject to them. When it was declared that traders, under particular circumstances, should be thus partially affected, it followed, that all other insolvents were to continue in their former state, as these did before such law was made. If such prior situation were preferable to that introduced by this law, if the common course of justice were more gentle than that recently introduced, a perpetual temptation existed to evade the new description, and to conduct the operations of fraud under such a disguise,

guise, as to render it impossible for a limited definition to lay hold of it. It unfortunately happens, that, in all these cases, the advantage is ever on the side of the invaders. The Proteus fraud, if caught in one shape, slips from the grasp, and starts up in another. A thousand partial attacks cannot subdue it. A radical cure, which may remove the cause of all these effects, is the only one rationally to be adopted. The framers of this act, however, did not reason thus. They discovered that new modes of iniquity had been put in practice: they proscribed these new modes; and sat down gratified with the reflection, that their business was now done, that the enemy was prostrated never to rise again.

We may therefore be at liberty to suppose, that, as the general principle was bad, this particular instance could not be good. In fact, by the following new definition of a Bankrupt, the legislature simply said, "If ye offend in any of the instances here mentioned, if ye commit any specific act hereby prohibited, ye shall incur the penalties denounced against such an offence: but an open field is afforded for the exercise of your ingenuity; if ye can cloath your iniquities in a new garb, if ye can evade the letter of the law, ye shall be secure from her vengeance, and may triumph in the unchecked insolence of fraud."

The definition itself was thus worded: "All and every person or persons, who shall use the trade of merchandize, by way of bargaining, exchange, bartry, chevifance, or otherwise, in gross or by retail, or seeking his, her, or their way of living by buying and selling, and being a subject born of this realm, or any the King's dominions, or denizen, who at any time shall depart the realm, or begin to keep his or her house or houses, or otherwise to absent him or herself, or take sanctu-

ary,

"ary, or suffer him or herself willingly to be arrested
 "for any debt, or other thing not grown or due for
 "money delivered, wares sold, or any other just or
 "lawful cause, or good consideration or purposes,
 "or shall suffer him or herself to be outlawed, or
 "yield him or herself to prison, or willingly or
 "fraudulently shall procure him or herself to be
 "arrested, or his or her goods, money, or chattels,
 "to be attached or sequestered, or depart from his
 "or her dwelling house, or make or cause to be
 "made any fraudulent grant or conveyance of his,
 "her, or their lands, tenements, goods, or chattels,
 "to the intent, or whereby, his, her, or their credi-
 "tors, being subjects born as aforesaid, shall or may
 "be defeated or delayed for the recovery of their
 "just and true debts; or being arrested for debt,
 "shall, after such arrest, be in prison six months or
 "more thereupon, or upon any other arrest or de-
 "tention in prison for debt, and lie in prison six
 "months upon such arrest or detention, shall be
 "accounted and adjudged a bankrupt to all intents
 "and purposes."

To all persons coming within this new definition were extended all the orders and regulations, which had been provided by the statute of Queen Elizabeth.

The horror which was entertained of the severity of the former act produced a consequence, which, so far from being extraordinary, might reasonably have been expected from it. The iniquitous insolvent, shut out from the high road of public fraud, traced out the safer and less known paths of private deceit. The mode of injury indeed was different; but neither the security of the trader, nor the faith of trade, were put upon a firmer footing. The practices of Bankrupts, says this statute, of late are so secret and subtle, that they can very hardly
 be

be found out or brought to light. To what was this grievance owing? The reader of the foregoing pages will doubtless be provided with an answer. But his answer will probably be different from that of the first parliament of James the First. He will perhaps not entirely ascribe it, with them, to this single circumstance, that the former statute, giving power to the commissioners to examine others than the Bankrupts, had not fully or sufficiently authorized them to examine the Bankrupt upon oath. But this was the most obvious and easy reason: as such, it was adopted; and a new regulation was made, giving authority to the commissioners to call the Bankrupt before them. If, upon due notice, he should not appear, they were empowered to proclaim him a Bankrupt; and if, after five several proclamations, he should continue refractory, they were authorized to issue a warrant for his apprehension. On his appearance, they were to examine him upon such interrogatories as they should think meet. If he should refuse to be examined, or to answer fully to every interrogatory, the commissioners were authorized to commit him to some strait or close imprisonment, there to remain until he should be more conformant. If, on the other hand, he should submit, and it should appear, that, on his examination, he had committed any wilfull and corrupt perjury, tending to the hurt or damage of his creditors, to the value of ten pounds, or above, he should be indicted thereof; and, upon conviction, should stand upon the pillory in some public place, by the space of two hours, and have one of his ears nailed to the pillory, and cut off.

When we read this curious clause, what are we to think of the wisdom of its framers? At the time of its formation, the crime of Perjury was well known in this kingdom; and had already called for the
vigorous

vigorous interposition of the legislature. It had been prohibited, generally, by the 5th of Eliz. c. 9. It had been punished by a forfeiture of twenty pounds, and imprisonment for six months, and perpetual discredit and infamy: or, in case of an inability to pay the fine, by being set on the pillory, there to have both ears nailed. The punishment was the same in every case. The legislature did not make any nice distinctions, as to the magnitude of the object which afforded a temptation to the culprit: they considered solely the atrocious quality of the offence, and, by the severity of the punishment, aimed at the extirpation of the crime. Not so this parliament. To the amount of nine pounds nineteen shillings and eleven pence, the Bankrupt might repeatedly perjure himself; still however would he be deemed innocent; still would he be untouched by the law. A single penny turned the scale. Should he dare to add this to the inoffensive sum, the majesty of justice would awaken, and infamy and mutilation would await the daring incroacher. But it may be said, this law, though it provided a punishment only in those cases, where the perjury amounted to ten pounds or upwards, did not affect the preceding statute, but left all inferior perjuries to the former course of law. Should this be said, what will be the consequence? That, in proportion to the magnitude of the offence, the quantum of the punishment diminished. The greater perjurer would be pilloried for two hours, would have one ear nailed and cut off; the lesser perjurer would be imprisoned for six months, would become for ever discredited and infamous; would pay a fine of twenty pounds; or, in lieu thereof, have both ears nailed to the pillory.

Forgetful, however, as these legislators appear to have been of the statute of Queen Elizabeth, at the time of framing this clause, their memories seem
to

to have been refreshed, and they perfectly recollected it, when they proceeded to the next. By this, a further provision was made for the examination of such as should retain the Bankrupt's goods, and of such as might be indebted to him. Of these, the persons refusing to appear, or, appearing, refusing to swear and to answer to interrogatories, became subject to arrest, and to an unlimited imprisonment at the discretion of the commissioners. If, upon submitting to answer in the manner prescribed, it happened that any person should *wilfully* and corruptly commit any manner of *wilfull** perjury, it was declared, that such offender, and such person or persons as should have suborned him to the commission of the crime, should be indicted for the same; and should, on conviction, incur such forfeiture, and receive and suffer such pains and punishment, as are limited by the statute made concerning perjury, in the fifth year of the reign of our late sovereign Lady Queen Elizabeth.

The rest of this statute is taken up with provisions for marshalling the creditors, for preventing the Bankrupt from conveying his lands or goods to others, or transferring his debts into other men's names, for the more easy recovery of the Bankrupt's debts, and for the security of the commissioners.

In this situation the Bankrupt system continued for twenty years; during which period it became apparent, that provisions, founded not on reason or well-fixed principles, but on the mere impulse of the occasion, could not be productive of advantage to the community, or put a stop to the evils which threatened to undermine the trade and commerce of

* This expression of wilfully committing wilfull perjury, is a faithful transcript of the act.

the kingdom. The several species of fraud, which had been prohibited, bore no proportion to the infinite variety of modes, which the ingenuity of the wicked, or the avaricious, was able to suggest. As a cup of water taken from the ocean diminishes neither its apparent bulk nor its resistless force, so the dismemberment of these small branches did not, effectually at least, check the growth or the alarming extent of the great stock of fraud. This is no ideal sketch; its outline is not distorted, nor is its colouring over-charged. The language of the legislature, again awakened by the general outcry of the nation, is yet more forcible and expressive. "Forasmuch," says the preamble to the statute the 21st of James I. c. 19. "as daily experience sheweth, that the number and multitude of Bankrupts do increase more and more, and also the frauds and deceits invented, and practised, for the avoiding and eluding the penalties of the good laws in that behalf already made, and the remedy by them provided: And for that divers defects are daily found in the former statutes made against Bankrupts, both in the description of a Bankrupt, as also in the power given to the commissioners, for the discovery and distributing the Bankrupt's estate, to the great encouragements of evil-minded persons, the hindrance of traffic and commerce, the great decay, overthrow, and undoing of many clothiers, by whom many thousands of the natural-born subjects of this realm be from time to time, in all parts of this kingdom, set on work: all which do tend to the general hurt of this realm."

The acts of parliament, which were so inefficacious as to justify these melancholy complaints, must have been radically bad. They were extraordinarily severe; they were calculated, by the summary process

cesses they introduced, to hunt out and to defeat the machinations of the fraudulent: but their severity was idle, and their process was ineffectual. The defect, therefore, must have been in the principle on which they were founded. While that continued, no modification of it could be productive of advantage. The same dexterity, which had invaded the existing acts, would continue to invade and to impede the operations of any future act, grounded upon the same principle. Fraud is of too subtle and volatile a nature to be confined within the limits of any definition. Fortresses after fortresses may be taken, but the enemy will still continue master of the country. A more decisive plan of operations must be adopted; the root of the offence itself must be struck at, before we can expect to extirminate the cause, and to prevent the mischievous consequences of its effects.

Of these assertions, we have the most convincing proofs in the preamble now before us. It affords the completest evidence of the inefficacy of the former statutes, of the new shapes in which fraud was perpetually springing up, and of the fatal consequences experienced by the nation. We will consider it, together with the statute itself; and take a comprehensive view of the mischief and of the remedy prescribed for it.

In this commercial country, where good faith ought to influence and to regulate mutual transactions, we find that integrity no longer flourished, but that the very laws, intended for the advancement and security of the honest, were productive only of encouragement to the dishonest and evil minded, of hindrance to traffic and commerce, of the ruin of the most material traders in the nation, the clothiers; and, through them, of thousands of industrious workmen employed by them, and finally of the general hurt of

the realm. Where the effects were so prodigious, the legislature undertook the double task, of ascertaining their origin, and of producing a substantial reformation. But, throughout this statute, we shall have occasion to lament the ignorance which they manifested of the former, and their insufficiency for introducing the latter.

The first step which they took was of a very summary nature. Determined at all events to adhere to the very statutes, which they had thus condemned as futile, they declared, that all and singular the statutes and laws (which, as we have seen, were two) theretofore made against Bankrupts, and for relief of creditors, should be in all things largely and beneficially construed and expounded for the aid, help, and relief of the creditors of the Bankrupt.

Specious and decisive as this sweeping clause may appear, we apprehend ourselves to be warranted in asserting, that it was equally unadapted to the purpose, and contrary to the immutable principles of law. If a statute be wisely made; if it combines, with a due knowledge of the ground of the evil, a sufficient remedy and an effectual prohibition; it will operate of itself, without requiring adscititious aid. If, on the other hand, it possesses neither of these properties, it will for ever continue a memorial of the nothingness of human wisdom, supported as it may be by every prop which the good-will of a future legislature may apply. But it may not be so obvious, that this clause militated against the principles of law.

Either the two Bankrupt Laws had no force, in which case this extension could not have improved them; or they had as much force before this clause, as they could have afterwards. In the interpretation of all statutes in general, whether penal or beneficial, restrictive or enlarging of the common law, four things,

things are to be considered : What was the common law before the making of the act ? what was the mischief and defect, for which the common law did not provide ? what is the remedy, resolved and appointed by the parliament, to cure the disease of the commonwealth ? what is the reason of the remedy ? These preliminaries being discussed, it is then the office of the judges always to make such construction, as shall suppress the mischief, and advance the remedy ; as shall defeat subtle inventions and evasions for the continuance of the mischief, and for private emolument and advantage ; as shall add force and life to the cure and remedy, according to the true intent of the makers of the act, for the general good *. To this rule, thus clearly laid down, what further can be added ? It comprehends every thing which an impartial, and consequently a good judge ought to do. What then was the intent of this clause ? Did they mean by it to strain the interpretation beyond the bounds of justice ? Did they mean that the commissioners should favour the creditor at the expence of the debtor ? If they did, they prescribed a crime, as the means of obviating an inconvenience ; if they did not, they directed to little purpose, as the whole of what they legally could mean was already acknowledged as the common law of the land.

But further. It is an invariable maxim, that penal laws are to be construed strictly. These statutes were highly penal ; the Bankrupt, throughout, was denominated and considered as a criminal ; confiscation, imprisonment, mutilation, and infamy, were denounced against him. A latitude of construction was, therefore, by the known rule of law, by no means to be allowed ; still less was it to be en-

* 3 Rep. 7. b. Heyden's Case.

couraged and incited by the voice of parliament. Nor will another maxim, that statutes against frauds are liberally and beneficially to be expounded, though certainly just in itself, be here of any avail. And that, for this plain reason. When the statute acts upon the offence, by setting aside the fraudulent transaction, it is to be construed liberally: but, where the statute acts upon the offender, and inflicts a penalty, as the pillory, or a fine, it is then to be taken strictly*. Indeed, the legislature seems to have been aware of this, by enacting the clause in question. Had the interpretation, which they were desirous of laying down, been that interpretation which the law adopted, their interposition would have been unnecessary. But, however a parliament may be competent to make new statutes, it never had, it never can have, a power to change the principles of justice and of truth. Suffering individuals may bow to the hand of oppression, and may groan under the unwarrantable incroachment: but sooner or later the voice of truth will be heard; the cause of humanity and of reason will find an advocate.

To a clause so comprehensive and unlimited, it may appear extraordinary, that the legislature should have conceived it proper to add any other regulations. Where those, to whom the authority of judging was delegated, were invested with so enormous a discretionary power, new descriptions and new provisions seem to be unnecessary. But the same reason, which occasioned the former clause, gave birth also to these. The system was radically bad: original principles were not consulted, and, to save the trouble of recurring to the origin of the disorder, partial remedies were perpetually applied, as oc-

* Blackst. Comm. Introd. § 3. p. 88.

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casional symptoms disclosed themselves. It is worthy of observation, how nearly the legislature, at the time which now engages our attention, approached to truth, and with how much dexterity they struck into a path, which led them away from her, to error and fresh uncertainty. The alarming evils, already mentioned, they attributed most justly to the great increase of Bankrupts and of fraud; they even went so far as to declare, that this increase was owing to the defects daily found in the former statutes. Here, they were on the threshold of truth. But here they stopped. Instead of annulling laws which were thus defective, they contented themselves with extending a definition, which no extension could render perfect; by adding new regulations, which, the experience they had had of the former might have taught, were only temptations held out to the fraudulent and designing.

By this new definition it was declared, that “ all
 “ and every person or persons that shall use the trade
 “ of merchandize, by way of bargaining, exchange,
 “ bartering, chevifance, or otherwise, in gross, or
 “ by retail, or seeking his, or her living, by
 “ buying and selling, or that shall use the trade or
 “ profession of a scrivener, receiving other men’s
 “ monies or estates into his trust or custody, who
 “ shall either by himself, or others by his procure-
 “ ment, obtain any protection or protections, (other
 “ than such person or persons as shall be lawfully
 “ protected by the privilege of Parliament), or shall
 “ prefer or exhibit unto his Majesty, or unto any
 “ of the King’s courts, any petition or bill, against
 “ his or her creditor or creditors, thereby endeavor-
 “ ing to compel them or any of them to accept
 “ less than their just and principal debts, or to pro-
 “ cure time, or longer days of payment than was
 “ given at the time of their original contracts; or,
 “ being

" being indebted to any person or persons in the
 " sum of one hundred pounds or more, shall not
 " pay, or otherwise compound for the same, within
 " six months next after the same shall grow due, and
 " the debtor be arrested for the same, or within six
 " months after an original writ sued out to recover
 " the said debt, and notice thereof given to him,
 " or left in writing at his, or their dwelling house,
 " or last place of abode; or, being arrested for debt,
 " shall, after his or her arrest, lie in prison two
 " months or more, upon that or any other arrest or
 " detention in prison for debt; or, being arrested
 " for the sum of one hundred pounds or more, of
 " just debt or debts, shall, at any time after such
 " arrest, escape out of prison, or procure his en-
 " largement by putting in hired or other bail;
 " shall be accounted and adjudged a Bankrupt to
 " all intents and purposes: And, in the said cases of
 " arrest, or lying in prison for such debt or debts,
 " or getting forth by common or hired bail, from
 " the time of his or her said first arrest."

To this definition were subjoined various new pro-
 visions, calculated, in the same narrow spirit of le-
 gislation, for remedying and supplying the imper-
 fections of the preceding acts. Doubts having
 arisen, whether, notwithstanding the power given to
 examine the Bankrupt himself, and such persons as
 were suspected to have or detain any of his estate,
 goods or chattels, the commissioners had power to
 examine the wife of a Bankrupt, and various con-
 cealments and enormities having arisen in conse-
 quence of such doubt; it was now declared, that
 the same process should be used against her, and that
 she should become subject to the same penalties, as
 the Bankrupt himself, or those who secured his pro-
 perty, were already declared to be. And to prevent

fraudulent conveyances of the Bankrupt's estate, it was further declared, that if any Bankrupt shall so convey away any of his property, to the value of twenty pounds or upwards, for the purpose of defeating the operation of these statutes, or to delay or defraud his creditors, and shall not, on examination, discover and deliver up such part of his property so conveyed away or detained, or shall not make it appear that his inability to pay arose from some casual loss; he shall, upon conviction, be set on the pillory in some public place, for the space of two hours, and have one of his ears nailed to the pillory, and cut off. Punishments were also denounced against such as should fraudulently pretend to be accountants to the king, or who should keep and enjoy any part of their estate, after a colourable conveyance to their friends. New directions were given to the commissioners, for the management of the Bankrupt's property; and the Bankrupt laws themselves were extended as well to aliens, as to natural-born subjects.

This statute contained one more provision of a very extraordinary nature, at which the unprejudiced mind of every Englishman must revolt. It was doubted, it seems, whether the commissioners, in case of resistance, had power, by the former laws, to break open the house of a Bankrupt: which, as the framers of this statute say, if they have not, the remedies by the former laws given will be to little effect. For this reason it was enacted, "that in execution of a commission, it shall be lawfull for the commissioners, or any other person or persons, officer or officers, by them, or the greater part of them, to be deputed and appointed by their warrant, under their hands and seals, to break open the house or houses, chambers, shops, warehouses, doors, trunks, or chests of the Bankrupt, where

“ where he or any of his goods or estate shall be, or
 “ reputed to be, and to seize upon, and order the
 “ body, goods, chattels, ready money, and other
 “ estate of such Bankrupt, as by the former laws are
 “ limited and appointed, whether it be by imprison-
 “ ment of his body, or otherwise, as by the said
 “ commissioners shall be thought meet.” What is
 this, but saying in plainer words, unless we break
 through the positive rules of law, unless we deprive
 an insolvent of every privilege enjoyed by an English
 citizen, we shall be unable to bring him to an account,
 or to satisfy the demands of his creditors?

C H A P. IV.

HAVING thus brought to a conclusion the second period of the Bankrupt Laws, when they received their greatest degree of extension, and included within their pale more descriptions of Insolvents than they had done before, or than they do at present, we proceed to the consideration of the third period, in which, although the objects of these laws were in general suffered to continue the same, their operation and severity were wonderfully increased.

But before we enter upon this subject, we must take notice of an Ordinance, which was passed in the year 1653 *. This, although it cannot be ranked in the number of the Bankrupt Acts, had nevertheless an operation for some time; and, as long as it continued in force, very considerably extended the action of those laws. The principal object of this ordinance, as we already have had occasion to observe †, was the delivery of poor insolvents from imprisonment. For this purpose, it was amongst other things enacted, that certain persons therein named should be constituted judges, to hear and determine, in a summary way, the causes of the imprisonment, and the escapes of all persons then committed, or who should, before the 20th day of October following, be committed to gaol, and not thence lawfully be discharged. Where they should find any just debt or duty owing by such prisoners, they were to make speedy provision out of such prisoner's

* Scobel, anno 1653. c. 13.

† *Supra*, Part. I. c. 7. estates,

estates, or trusts of their estates, by sale, lease, grant, or otherwise, for the satisfaction of the creditors. They were empowered to examine parties and witnesses for the proof of escapes, and for the discovery of such prisoner's estates, or of any fraud or trust relating thereto; and to act as fully, to all intents and purposes, in all these points, as any commissioners might do against a bankrupt or a bankrupt's estate, by virtue of any commission grounded upon any of the statutes against Bankrupts. The persons so committed, if they should fail to pay their debts before the first day of the ensuing month of April, were to be accounted Bankrupts from the time of their first commitment.

We cannot but perceive, how wonderfully this regulation extended the operation of the Bankrupt Acts. To constitute bankruptcy, neither trading nor any specific acts were any longer necessary. Every person, of whatever description, who was committed to prison, and who did not pay his debts, was now to be accounted a Bankrupt.

The ordinance did not stop here. It was esteemed necessary to devise some punishment for the fraudulent; and a method was fallen upon, equally unusual and unreasonable. It was declared, that if the judges, or any three or more of them, should find any person, other than the prisoner himself, guilty of any fraud, tending to deceive any creditor, or of any wilful concealment of any estate, or of any trust of any estate, they should proceed against such guilty person as a Bankrupt, so far as to enforce him to pay such fine as the said judges, or any three or more of them, should deem answerable to the offence, *not exceeding double the value of what the creditors have or might have suffered by such fraud*, towards the satisfaction of the creditors, so as to make up what the debtor's own estate should not satisfy: the remainder of the said

said penalty was to be paid to the treasurer of the county for maimed soldiers. If the offender should not have wherewithal to satisfy the fine, he was to be adjudged to the pillory, or to the work-house, or to both, as the judges should think meet.

Thus every boundary, which former law-makers had erected, was completely overthrown. The Bankrupt laws were extended, not merely to insolvents of every possible species, but even to those who owed nothing; to those, whose interest or whose friendship had prompted them, to attempt the preservation of some part of the prisoner's estate for himself or his family.

Short-lived however was this extravagant provision. At the Restoration, the ordinances which had been made during the Protectorate, and the tumultuous times which preceded, lost their force, and became as if they never had existed. This law followed the fate of its companions, and the System of Bankruptcy returned to the same situation, in which it had been left by the statute the 21st of James the First.

The Bankrupt Laws had not been very long made, before it was esteemed necessary to set some bounds to that wide extension, to which they had been carried by two concurring causes. The definition of those persons upon whom they were to operate was so general, the terms made use of to convey the meaning of the legislature were so comprehensive, that it was by no means easy to except any merchant or trader from being drawn into their vortex. The phrases "any merchant," "any person using or exercising the trade of merchandize," "any person seeking his or her trade of living by buying and selling," extend to every one engaged in a commercial line. As the letter of the law was so universal, we can the less be surprized that the Commissioners of Bankrupt, and the Courts in Westminster Hall, whose gains en-

creased

creased in proportion to the number of subjects upon whom their jurisdiction could operate, were disposed to profit by the bounty of the legislature, and to disregard any nice distinctions between the different species of traders. Experience however shewed, that the very means which were proposed for the benefit of commerce, were become, in several respects, an essential hindrance to it; that the unlimited phraseology, which was calculated to envelop all traders, had reached to those which it ought not to have affected. So difficult was it, so difficult will it ever be found, to fabricate definitions for the purposes of a partial policy. This consequence did not immediately happen. In proportion as commerce became more flourishing, and as new branches of traffic presented themselves, various mercantile societies, or trading companies, were established. Within the compass of little more than half a century, the nation beheld the rise of the East India Company, the Guinea Company, the Fishing Company, and several others which were framed with different commercial views. The probability of advantage which these held out to adventurers, and the encouragement which they received from the Crown and the Parliament, tempted multitudes to engage in them; amongst others, many noblemen, gentlemen, and others, until that time unengaged in commerce, advanced considerable sums upon the speculation of immense advantage, and became joint owners and partners in the undertakings. There seems to be but little doubt, that, by the general definitions above mentioned, these noblemen and gentlemen, thus investing their money in a trading company, receiving the returns of their adventures in ready money or commodities, and again selling these or exchanging them for others, were become liable to the operation of the Bankrupt Laws. But as this species of merchandize was new, and as it

increased

increased gradually, no decisive steps were for some time taken. As the novelty of the business wore off, the eyes of the commissioners began to open, and they felt an inclination to participate in those gains, which the public at large was supposed to derive from it. This inclination first shewed itself in a doubt, whether these adventurers might not and ought not to be made subject to the statutes provided against Bankrupts. The doubt, once started, soon grew up into a certainty; and, in the year 1653, Sir John Wolstenholme, an adventurer in the East India Company, was declared a Bankrupt, by a judgement of the court of King's Bench, upon the ground of his having a share in the joint stock of that company; in consequence of which he had sat in the committee of the company as a merchant in the management of trade; had received at several times the produce of his stock upon returns of ships, had become indebted to divers persons, and had absconded. The court pursued the letter of the law. It held, that, although he did not get the greatest part of his living by buying and selling, (he being possessed of an estate of 3000*l. per annum*); yet his employment in the committee, his management of the trade, his taking out his stock and goods, and disposing of them, brought him within the statutes; and the judges did not forget on this occasion the sweeping declaration of the act the 21st of James the First, that the Bankrupt laws should in all things largely and beneficially be expounded for the aid of creditors*. As the law stood, we cannot reasonably condemn the propriety of their determination. The other noblemen and gentlemen, however, who had launched out into similar undertakings, soon took the alarm at a door

* Sir John Wolstenholme's Case. Hughes's Grand Abr. Godinge on Bank. 17.

being

being thus opened to an extension, which threatened in its consequences so soon to affect themselves. Where so many persons of consequence were interested, it is not extraordinary that means should speedily have been devised, to put a stop to a measure which they deemed so unpalatable. In the year 1662 an act of parliament * was passed, for the purpose, as it was thought fit to assert, of declaring and explaining the law, and to prevent these volunteer merchants from being discouraged in their honourable endeavours for promoting public undertakings. By this it was enacted, that no person, putting his money into the East India Company, the Guinea Company, or the Royal Fishing trade, and receiving his dividend of fish, goods, or merchandizes, in specie, and selling or exchanging the same, shall, by reason only of such adventure, receipt, exchange, or sale, be adjudged or reputed a merchant or trader within any statute or statutes for bankrupts, or be liable thereto. It was at the same time declared, that these several species of trading should not protect any one from being a bankrupt, who dealt in any other line of commerce. Finally, the judgement given by the court of King's Bench relating to Sir John Wolstenholme was reversed, with a proviso for the security of the purchasers under his commission.

On the institution of the National Land Bank, in the year 1696, it was declared by the statute the 7th and 8th of William III. chap. 31. That no member of that corporation should, in respect of his stock therein only, be, or be adjudged liable to be, a Bankrupt. A similar prohibition was, in the year following, inserted in the statute the 8th and 9th of William III. c. 20. § 47. when this corporation was greatly increased and improved, and when it first re-

* 13 and 14 Car. II. c. 24.

ceived the respectable denomination of the Bank of England *.

In the year 1698, on the erection of the New East India Company, the same indulgence was given to the adventurers.

These, however, were merely partial provisions, calculated to except particular sets of men from the general regulations. On the wisdom of the policy to which they were indebted for their existence, it may be hazardous to pronounce a judgement. If the Bankrupt laws were productive of advantage, these personal exemptions will labour under the suspicion, of having been calculated to promote a jobb, and to favour a monopoly at the expence of the public good. If, on the other hand, these provisions were salutary, a reason can hardly be assigned, why commerce in general should have been fettered by a particular code. Nor will it be easy to ascertain why these companies were thus indulged, unless we should venture to surmise, that it was owing more to the influence and power of the individuals concerned, than to the real propriety or advantage of the institution.

During all this time, the Bankrupt laws received no alteration; they continued to include the same description of men (excepting those thus particularly exempted) and to operate in the same manner. Having already sufficiently considered what the scope of these laws was, we shall be the less surprized to find, that their operation was not attended with that success which had been expected from it, and that Bankruptcy was become a species of trade, from which greater advantages were to be derived, than could, in many cases, be expected from fair dealing. Without

* See farther Declarations of the same point, Stat. 5 Ann. c. 13. 7 Ann. c. 7. 3 Geo. c. 8.

in this place considering the principle on which these laws were founded, it must appear evident, from an inspection of them, that they were extremely defective in the means which they proposed for the attainment of their assigned end. These imperfections gradually disclosed themselves. The first which were taken notice of were the insufficient powers delegated to the commissioners, for compelling the appearance of the Bankrupt, and of the necessary witnesses; for examining them on their appearance, and compelling a discovery. It required not much sagacity to see, nor a long time to discover, that, with these defects, the operation of the acts must have been very imperfect. Of consequence, those who were interested to evade them, readily embraced so favourable an opportunity. The example once set was readily followed; and, at length, in the year 1705, it was become a daily practice for men to become Bankrupts, not so much by reason of losses and unavoidable misfortunes, as with an intent of defrauding their creditors, and of hindering them from a satisfaction of their just debts and demands*.

To administer a remedy for these alarming disorders, the legislative power was again called in. Great consultation was bestowed, and unusual debates were held upon the subject. The result of these was the statute the 4th and 5th of Anne, c. 17. This act did not make its appearance in the most favourable manner; for it passed by a majority of only one vote, the numbers for it being fifty-four, those against it fifty three †. From this circumstance we may be prepared to meet with something in its contents extraordinary, if not unconstitutional.

The first point which the framers of this law undertook to correct, was the insufficiency of the means

* Preamble to Stat. 4 and 5 Ann. c. 17.

† Comm. Journ. 6 March, 1705.

for compelling the appearance of the Bankrupt, and for extorting a full disclosure of his property *. For this purpose they enacted, that if any one, becoming a Bankrupt within the several statutes made against Bankruptcy, and having a commission issued against him, shall not, within thirty days next after notice thereof in writing left at his usual place of abode, and notice inserted in the Gazette of the issuing of such commission, and of the time and place of a meeting of the commissioners, surrender himself to the commissioners, or some of them, and *submit to be examined* from time to time upon oath, by and before them, or the major part of them, and *in all things conform to the several existing Bankrupt Acts*, and also, upon such examination, fully and truly disclose and discover how, and in what manner, to whom and upon what consideration, he had disposed, assigned, or transferred any of his goods, wares, merchandizes, money, or other effects, or estate, and all books, papers and writings relating thereto, of which he was possessed, or in or to which he was any ways interested or intitled, or which any person had or might have in trust for him; or for his use, *at any time before or after the issuing the said commission*, and also deliver up to the commissioners all his estate and effects, books, papers and writings, as, at the time of such examination, shall be in his possession, custody, or power (the wearing apparel of himself, his wife and children only excepted), then the said Bankrupt, in case of any default or wilful omission in any of the premises, and being thereof lawfully convicted by Indictment or Information, *shall suffer as a felon without the benefit of clergy* †.

* See the Statutes 13 Eliz. c. 7, and 1 Jac. I. c. 15.

† By the 6th section of this act it is provided, that the goods and estate of such persons, as should thus be convicted as felons, should go to, and be divided amongst, the creditors.

Whatever

Whatever might have been the motives which governed the framers of this act, we, who are uninfluenced by any of those prejudices which probably actuated them, must find it difficult to imagine, how a law of this sanguinary nature could have received the legislative sanction, contradictory as it is to the first principles of the constitution, repugnant as it is to the ordinary and long-established forms of justice. By declaring that a man, who had committed merely a civil offence, should be considered as a felon, the ancient boundaries between civil and criminal offences were thrown down. It would have been just as reasonable to declare, that for the future the mode of proceeding against a robber or a burglar should be by an action of debt, or against a murderer by an action of trespass. Is this an absurdity? If it is, what must be the converse of the proposition? But farther.—For what offences was this capital punishment provided? The statute particularly specifies them. The first was, for failing to surrender himself to the commissioners within thirty days after notice of the commission, and of the time and place of the meeting, in writing, being left at his usual place of abode, and inserted in the Gazette. Bankrupts are seldom to be found at their usual abode; departing from the dwelling house is one act of bankruptcy. They may be incapacitated from reading the Gazette, and from attending the commissioners within 30 days, by being in a foreign country, where even the news of the commission may not have reached them; for departing the realm is another act specified by the former statutes. No allowance however was made for these circumstances: and how it is possible to ascertain, whether they were wilful or not, is rather difficult to determine. The second offence, was a refusal to submit to an examination upon oath, and to disclose how, to whom, and upon what considera-

tion, he had disposed of his estates and effects, and of his books, papers, and writings. May it not be demanded, whether he was not warranted in such refusal? Had he not a right, as a freeborn English citizen, to refuse? The invariable maxim of the law, in all cases whatsoever, is, that no man shall be obliged to criminate himself. The vilest traitor, the most atrocious criminal, cannot be condemned otherwise than by the evidence of witnesses. He may, indeed, if he chuses it, confess his crime; but no process exists in this happy country, by which he is compellable to become a self-accuser. Is then that justice, which the benignity of the law has allowed to criminals, to be denied to the unfortunate? But let us consider what he was thus to disclose, and the impropriety of the provision will strike us more forcibly. He was to discover how, in what manner, to whom, and upon what consideration, he had disposed of, assigned, or transferred any of his goods, wares, merchandizes, money, or other effects or estate, and all books, papers, and writings, relating thereto, of which he was possessed, or in or to which he was any way interested or intitled; or which any person had either before or then in trust for him, or for his use, *at any time before or after the issuing of the commission.* Let any man, the most honest, and the most correct, put his hand upon his breast, and pronounce upon the possibility of a compliance with this injunction. In the greatest regularity of an uninterrupted business, in the compōsure of a prosperous commerce, the difficulty of so general a disclosure must be apparent. How great then must it be found amidst the confusion of a total wreck? In proportion to the honesty of a Bankrupt, his embarrassmentment will most frequently be increased; the sudden transition from affluence to poverty, from an unlimited credit to insolvency, the frauds of a correspondent,

spondent, or the villainy of a partner, may perplex and entangle his affairs beyond the possibility of a denouement. With the most upright intentions, he may prove unable to render a satisfactory account; with all the candour and integrity of an honest merchant, he may be drawn before the tribunals of his country, he may suffer the infamy and undergo the punishment of a felon. Nor was the severity of this dispensation limited to the foregoing specific offences: the bankrupt was declared to be equally liable to it, if he should not "in all things conform to the several statutes already made concerning bankrupts." How vague and indefinite a phrase, by which the lives of thousands became subject to the hazard of an arbitrary interpretation!

Had the legislature gone no farther, than to describe the offence, and to denounce the punishment, whatever our sentiments on the expediency, or the justice of these provisions might have been, we should have had no reason to doubt their knowledge of the ordinary forms of judicial proceedings. But they did not stop here; they directed the modes of prosecution which were to be pursued, and, by doing more than there was any occasion to do, convinced posterity that they were ignorant of what ought to be done. They declared that the Bankrupt should suffer as a Felon, if he should be lawfully convicted of any of the aforesaid offences by *Indictment or Information*. That a criminal should be lawfully convicted before he should suffer punishment is so extremely evident, that it appears extraordinary for the law-makers so particularly to have enacted it. But it is still more extraordinary, that they should thus have been so uncommonly cautious, when, in the very same sentence, they prescribe a mode of conviction which was clearly illegal. The two modes directed are by Indictment or by Information. The

first of these is that which the law ordinarily pursues. The interference of the legislature was therefore futile, as it added nothing to the customary and constitutional process of the courts. The second, by information, stands in a very different predicament. Informations of every species are confined by the constitutional law to mere misdemeanors only: they never did extend, and it is to be hoped they never will be construed to extend, to affect the life of a citizen. So tender is the law of England of the lives of the subjects, that no man can be convicted of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours; that is, by twelve at least of the Grand Jury, and afterwards by the whole Petit Jury, of twelve more, finding him guilty upon his trial. On a prosecution by Information, this rule cannot be observed. As they issue either from the Master of the Crown-Office, or from the Attorney General, the previous verdict of the Grand Jury can never be had, and, consequently, the rule of law, which prescribes a double verdict in all criminal cases, cannot take place. It therefore follows, that, as this necessary preliminary is wanting, the direction itself militates against the established law of the land, and is in the highest degree illegal and injurious to the rights of the subject. It may however be said, that, as the legislature gave an option between these two modes, no bad consequences could ensue: if the mode of prosecution in criminal cases by Information is unconstitutional, that by Indictment is legal; the latter therefore would in all such cases be pursued, and the former would be considered as a mere surplusage. Is this a sufficient apology for the incorrectness of an highly penal law? Where so little attention is bestowed on a business of such importance, the public has a right to complain
of

of the misconduct of those, whom it has delegated to watch over and to protect the constitution. A legislative blunder is an impeachment of the national understanding, and subjects the character of a whole people to the censure or the derision of the universe.

No sooner had the framers of this law declared that a Bankrupt should be deemed a Felon, in case of his neglecting to surrender himself within thirty days, than they appeared to repent of their severity, and, by a new provision, totally to alter that which they had just made. By the very next section, a power was given to the Lord Chancellor of enlarging the time of such person's surrender and discovery, for any period not exceeding sixty days *. We shall abstain from making any observations at present upon this alteration, as they will more properly find a place hereafter, when we shall arrive at the statute the fifth of George the Second.

Had the power of the commissioners extended no farther than to compel the appearance of the Bankrupt himself, but little advantage could, in many cases, have been derived from it. Where the Bankrupt refused to make any discovery, the object of the commission must have been altogether frustrated; even if he did disclose what he knew, a thousand important circumstances might remain obscure, which nothing but the evidence of others could elucidate. The statute therefore proceeded to direct a process, by which all necessary witnesses might be compelled to appear, and to answer such interrogatories as the commissioners might deem expedient to propose. In case of a disobedience to their summons, of a refusal to be sworn, or to answer to interrogatories, they were made liable to imprisonment without bail

* § 2.

or mainprize, until such time as they should conform to the directions of the act. The judges of the several courts, and all justices of the peace, were empowered to grant warrants for their apprehension and commission. To prevent an undue and vexatious exertion of this authority, it was declared, that no person should be obliged to travel above twenty miles to be examined; and the imprisonment of continuations witnesses was immediately to cease, upon their becoming submissive and conformable. Such was declared to be the future operation of this act. A kind of retrospective authority was now added, by which its operation was made to extend to all Bankrupts, against whom a commission had already issued, and who were disposed to comply with the above injunctions. Considering what was the nature of these injunctions, and of the penalties annexed, it may be presumed that few Bankrupts would voluntarily have made themselves liable to so severe a jurisdiction, or have incurred the risk of so dangerous a contingency. The legislature however attempted to induce them to comply by an assuring declaration, that, by so doing, they should to all intents and purposes have the benefit of this act. It might not perhaps be apparent to every bankrupt, what the mighty benefit of this act was, which was thus thrown out as a bait; great however as it might be, it hardly could conceal the hook which it was intended to cover. For, in the very next section, it is further enacted, that if any person, thus voluntarily surrendering, shall afterwards neglect or omit to discover and deliver up his estate and effects, and in every thing to act and do as by this act is directed, he shall be adjudged a fraudulent Bankrupt, within the true intent and meaning of this act, and thereof

* § 3.

† § 5.

+ § 4.

** § 17.

† § 3.

†† § 18.

being

being lawfully convicted, shall suffer as a felon without the benefit of clergy.

Notwithstanding all this severity, the main object of the act, namely, the advantage of the creditors, must have been but indifferently fulfilled. As it was still in the option of the Bankrupt to appear and to conform, or to continue refractory; wherever the latter might appear most eligible, as in many cases it undoubtedly would, the creditors must have continued without a remedy. To obviate this palpable inconvenience, it was therefore enacted, that every person, who should have accepted of any trust, or should conceal or protect any real or personal estate, of any Bankrupt, from his creditors, and who should not, within thirty days next after issuing the commission, and notice thereof given to him, disclose such trust and estate in writing to some one of the commissioners, and submit himself to be examined by them, and truly discover the same, should forfeit the sum of one hundred pounds, and double the value of the estate so concealed, for the use of the creditors*. On the other hand, as an encouragement to those who had it in their power to make such discovery, it was declared, that if, within sixty days after the above thirty, any one should voluntarily come in and discover any part of the Bankrupt's estate, he should be allowed the sum of 3 per cent. out of the neat produce of what should be recovered†. It were unnecessary to enlarge upon these two provisions, as it must strike any one who will give himself the trouble to consider them, that a very curious inconsistency might frequently have arisen, from the incorrect manner in which they were worded. Suppose that a concealer of part of a Bankrupt's estate, who had stood out obstinately for thirty days, had after-

* § 9.

† § 10.

wards repented him, and had voluntarily come in and disclosed all he knew. To the operation of which of these propositions would he have been subject? By his original disobedience, he would have incurred the penalties of the first; by his subsequent submission, he would have become intitled to the reward of the latter. The determination of the court must have been like that of the Lacedemonian judges, who rewarded Isadas with a crown of laurel for having defeated the enemy, and immediately fined him a thousand drachmas for having gone out to battle unarmed.

The former statutes, in their earnestness to provide for the creditors, had entirely overlooked the interests of the Bankrupt. It did not appear to have occurred to the legislature, that there was no small injustice in absolutely stripping an insolvent of every thing, and in exposing him and his innocent family to the extremity of want and distress. To put this matter on a better footing, and to redeem the Bankrupt system from the charge of cruelty, it was now enacted, that every Bankrupt, conforming to the directions of this act, should be allowed the sum of 5 per cent. out of the neat product of all the estate which should be recovered; with this limitation, that such allowance should not exceed in the whole the sum of two hundred pounds: that he should be discharged from all debts, due and owing by him at the time he became Bankrupt; and that in case he should afterwards be arrested, prosecuted, or impleaded, for any such debt, he should be discharged upon common bail, and might plead in general, that the cause of such action accrued before he became Bankrupt, and might give this act and the special matter in evidence*.

Here again the framers of the act thought better of what they had just said, and, without assigning any reason for so sudden a change in their sentiments, they enacted, that no Bankrupt should be intitled to receive such dividend of 5 *per cent.* unless the neat product of his estate should be sufficient to pay eight shillings in the pound; but that, instead thereof, he should be allowed and paid so much money, as the assignees and the major part of the commissioners should think fit to allow*: a very vague and indeterminate mode of expression, which, in its consequences, instead of preventing fraud, might prove no inconsiderable incitement to the iniquitous concealments of insolvents.

It was farther declared, that no Bankrupt should receive any advantage from this act, who had advanced more than one hundred pounds on the marriage of any of his children, unless he should be able to prove to the satisfaction of the commissioners, that, at the time of such advance, he had property sufficient to pay twenty shillings in the pound to all his creditors, over and above such marriage, portion †. And every Bankrupt was excluded from the benefit of this act, against whom it should be proved, that he had, within twelve months before the issuing of the commission, lost in any one day the sum of five pounds, or, on the whole, the sum of one hundred pounds, by any species of gaming ‡. These provisions were highly proper, and it is pity that a better use has not been made of them.

These were the exceptions which the legislature made to the preceding list of indulgences. But to make traders still more circumspect in their conduct, a new provision was framed, by which their merits or demerits were again to be scrutinized, before they

* § 8.

† § 12.

‡ § 15.

could become entitled to any of the benefits proposed by this act. It was now declared, that, before any allowance or indemnification should take place, the commissioners should certify, in writing, under their hands and seals, to the Lord Chancellor, that the Bankrupt had in all respects conformed himself, and that there appeared to them no reason to doubt of the truth of what he had discovered, or that the same was not a full discovery. This Certificate was to be confirmed by the Chancellor, subject to such objections as the creditors might make to it.

Having, in this manner, made such regulations with regard to the Bankrupt himself, as were then deemed expedient, the legislature proceeded to direct in certain points the conduct of the Commissioners.

It was, in the first place, enacted, that where it should appear to the Commissioners, that a mutual credit had subsisted between the Bankrupt and any person who should be indebted to him, the same being fully proved, and the accounts remaining open and unbalanced, the commissioners or the assignees should adjust the account, and should take the balance due in full discharge of it.

The Commissioners were also directed to appoint, within the thirty days, three several meetings, for the purpose of transacting the business of the commission: the last of which they were to fix on the thirtieth day.

The next regulation was of a very different kind, and was founded on the improper conduct of these delegates. It were to be wished, for the credit of the office, that the nature of this enquiry would permit us to draw a veil over the misbehaviour of our predecessors. Prejudiced, however, as we may be

* § 19.

† § 11.

‡ § 13.

in favour of Commissioners of Bankrupt, we are obliged to confess that they had oftentimes indulged themselves, in the intervals of their business, by eating and drinking at the expence of the creditors, to the great prejudice both of them and of the Bankrupt. This doubtless must have arisen, from the circumstance of their considering the labourer to be worthy of his hire. As no recompence was then allotted to them for doing the business, they probably devised this expedient to obtain one, as the most pleasing and the least exceptionable. Be this as it will, we find that the legislature considered the matter in a very serious light; for it was enacted, that no monies whatever should be paid or allowed by the creditors, or out of the Bankrupt's estate, for the expences of the commissioners, or of any other person, in eating and drinking; and if any commissioners should order such expence to be made, or should eat or drink at any meeting, at the charge of the creditors or out of the Bankrupt's estate, he should for ever after be disabled to act as a commissioner in that or any other commission. Finally, it was ordained, that this act should continue in force for the space of three years, and thence to the end of the next session of parliament, and no longer. It was continued for five years more by the statute 7th Anne c. 23, and at length expired in the year 1716.

If it were not too presumptuous to pity where we are bound to reverence, how greatly might we compassionate the situation of the parliament which made the foregoing law! what must have been their sensations, when they discovered, that the experience of a single year had been sufficient to prove the inefficacy of these new provisions! they had arbitrarily sported

with the rights of their fellow-citizens, they had overthrown the antient boundaries of the law; but they had not restrained the machinations of fraud, they had not protected the honest and industrious trader. Nor had they even the consolation of reflecting, that, by these violent and sanguinary institutions, they had promoted either the interests of commerce, or the cause of morality. Of this unfortunate truth they must have had compleat conviction, when, early in the year 1706, their attention was aroused by a Petition presented to the House of Commons, by several merchants and traders of the city of London, enumerating the grievances under which they laboured, and particularly insisting that, notwithstanding the late act, there were still carried on divers notorious frauds, (and it was to be feared wilful) perjuries, and secret evasions of that law, to the manifest prejudice of trade, and the endangering of the national credit both at home and abroad*. This petition was immediately referred to a committee, appointed for the purpose of examining into the abuses relating to or arising from the former act †.

No sooner was it known that Parliament had taken this step, than an inundation of complaints broke in upon them. A Petition was presented by divers miserable Bankrupts, setting forth, that they had surrendered all they had in the world for the use of their creditors, on the penalty of death, under the encouragement and directions of the late Bankrupt Act, but as yet they had received no benefit thereby: that they had in all things complied with the said act, in hopes of enjoying liberty, and the other promised benefits; yet some words in the said act seem-

* Comm. Journ. 17. Jan. 1706.

† Ibid.

ing obscure to the judges, the petitioners were construed not to be within their meaning; and some of them (although they had duly obtained their certificates) had since been taken up, and put into prison: so that, presuming on a parliamentary security for their liberty, they were reduced, with their wives and children, to a misery past all example. They, therefore, prayed, that such Bankrupts, as had surrendered their effects according to the said act, might be immediately relieved by some short bill, or clause, to explain the said act in favour of the petitioners.—The tide, however, at that time ran so strongly against this species of insolvents, and parliament was so thoroughly incensed against them, that the petition was instantly dismissed without farther consideration*.

Two other petitions were afterwards presented from the principal traders at Taunton and Worcester, which, coinciding with this general opinion, met with better success. By these the House was informed, that the good intent of the former act had been subverted, through the subtilty of Bankrupts combining with their relations and confederates, to the ruin of many creditors, and to the great decay of trade and credit†.

Contradictory as the scope of these petitions may appear, they perfectly agree in establishing the truth of our proposition, that mischief, instead of advantage, had arisen from the former act. It had been so unlucky as to displease all parties: the Bankrupts complained of its excessive severity; the creditors exclaimed against the encouragement it had given to fraud, and the manifest detriment it had occasioned to themselves. Indeed the legislature appeared now

* Comm. Journ. 22. Jan. 1706.

† Ibid. 27 Jan. and 8 Feb. 1706.

to be in earnest, and to enter very seriously upon the business of reformation. The Committee proceeded vigorously in the investigation of the several abuses which had recently sprung up, and, on the 12th of February 1706, Sir Gilbert Heathcote reported to the House the result of their enquiries. By this instrument it appears, that the defects of the former act were reducible to three heads; first, That it did not provide Penalties upon such Bankrupts, as should remove goods or effects from off the premises; secondly, That it did not give sufficient power for the detection and punishing Concealers of Bankrupt's effects, which was avoided under the umbrage of the thirty days notice, allowed to them by that act, to come in and discover, after the issuing of the commission; thirdly, That several of the Commissioners, appointed for putting the act in execution, had been guilty of abuses and vill practices. Each of these several charges was substantiated by very full and satisfactory evidence, and leave was given to bring in a bill, to explain and amend the statute of the preceding year.

By this new act, which appears as the statute the 5th of Anne c. 22, and which was passed on the 26th of March following, it was in the first place enacted, that if any person, who should become Bankrupt, or any other person by or with his order, consent or privy, should, after the 25th day of April then next ensuing, remove, carry away, conceal, destroy, or embezzle, any of the goods, wares, merchandizes, monies or effects, whereof such Bankrupt, or any other in trust for him, is or are possessed or intitled unto the value of twenty pounds or upward, or any books of accounts, bonds, bills, notes, papers or writings relating thereunto, with

* Comm. Journ. 12 Feb. 1706. † Ibid. 26 Mar. 1706.

intent to defraud his creditors, every such person and persons so becoming Bankrupt, and being thereof lawfully convicted, shall suffer as a felon without benefit of clergy; and, in such case, such Bankrupt's goods and estate shall go to and be divided among the creditors &c.

After all the pains which had been taken to frame this act in the most complete and satisfactory manner, is it not surprizing that it should have been so worded, as to become what, if the respect due to all legislative proceedings did not restrain us, we might be justified in terming absolute nonsense? The intention with which it was made was obvious; but, before that intention could operate, it was necessary that the words in which it was clothed should be precise and explicit. An highly penal act, as this was, could be interpreted only by the most rigid rules of construction; even the slightest flaw must have been attended to, in favour of the life of the subject. What then must have been the fate of this act? Who were the persons who legally could have been affected by it? Not those against whom it was made. Frauds, concealments, and imbezzlements, were not within its purview, however earnestly the legislature might have laboured to include them. By the strangest instance of incorrectness, which the code of any nation probably can produce, the circumstance of becoming a Bankrupt, and thereof being lawfully convicted, was declared to be the only crime which should entail a capital punishment. The candid reader, who shall dispassionately peruse the clause in question, will determine upon the propriety of our construction. If his opinion shall coincide with ours, he will possibly draw conclusions, which it may be deemed indecent

for an individual to proclaim. The cause of truth requires him to state the fact; he leaves it to the world to make it's own reflections.

An alteration was then made in the business of Certificates; hastily perhaps and unadvisedly, as we may have occasion hereafter to consider more fully. At all events, a somewhat longer experience of the effects of the preceding act might have been permitted, before the introduction of so material an alteration. But parliament was in the mood of reformation, and consequently less disposed to investigate consequences. It was therefore enacted, That, in future, no Bankrupt should be discharged of all or any of his debts owing at the time of his Bankruptcy, or be intitled to any allowance or benefit from the former act, unless both his allowance and certificate should be first signed by four parts in five in number and value of his creditors, testifying their consent*. And, as a means of preventing the undue procurement of such signatures, it was farther declared, That every bond, note, or other security, given by a Bankrupt, or by any person for him, to or for the use of, or in trust for, any creditor, as a consideration or inducement to sign such allowance or certificate, should be void†.

No law had yet been made, which gave either to the Commissioners or to the Creditors an authority to chuse Assignees of the Bankrupt's estate and effects. The former had indeed been empowered to assign any debts due to the Bankrupt to such person as they might think proper, for the purpose of recovering them more easily‡. But this assignment was infinitely of a more confined nature, than the total and absolute transfer which is now known by that name. By some means, however, with which,

* § 2.

† § 3.

‡ Stat. 1 Jac. I. c. 15.

at this distance of time, we are unacquainted, a practice of appointing Assignees had obtained; the first instance of which we met with in the Statute the 4th and 5th of Anne *. This matter, so exceedingly important to the interests of the creditors, now engaged the attention of the legislature. It was enacted, That the commissioners should give notice in the Gazette of the commission being issued, and should appoint a time and place for the creditors to meet (which meeting, for the city of London, and all places within the Bills of Mortality, should be at Guildhall), for the purpose of chusing Assignees. To such persons only, as should be nominated and chosen by the majority of the creditors then present, the commissioners were to assign the estate and effects of the Bankrupt. The Assignees, so chosen, were to keep books of the account of the Bankrupt's estate, with liberty for any of the creditors to resort to and inspect them †. But, as a necessity for an assignment might arise, before any such meeting could take place, the commissioners were empowered, *ex necessitate*, to appoint Assignees; who, nevertheless, were to be removeable on such meeting at the pleasure of the creditors, and were to deliver up to the Assignees then chosen all such estate and effects of the Bankrupt as might have come to their hands, under the penalty of one hundred pounds ‡.

The Assignees, when they were so chosen, had authority to compound with any debtors or accountants of the Bankrupt, and to take such reasonable part, as might upon such composition be gotten, in full discharge of such debts or accounts ||.

As these acts gave a very large and despotic power to creditors over their debtors, and as it was more than probable that they might be abused, and

* 4 & 5 Ann. c. 17. § 11. † § 4. ‡ § 5. || § 6.

converted into the instruments of oppression, the framers of this act deemed it expedient to check, if not absolutely to prevent, the false and malicious procurement of Commissions. For this purpose they enacted, That no Commission under the Great Seal should be awarded or issued against any person, at the instance or petition of any single creditor, unless his debt should amount to the sum of One Hundred Pounds or upwards; nor on the petition of two creditors, unless their debts should amount to One Hundred and Fifty Pounds and upwards; nor on the petition of three or more creditors, unless their debts should amount to Two Hundred Pounds and upwards. As a farther preliminary to the issuing such petition, the petitioning creditor was to give a Bond to the Great Seal, in the penalty of two hundred pounds, to be conditioned for proving his debt, and for proving the party a Bankrupt at the time of taking out the commission. On failure of so doing, or on proof that such commission was taken out fraudulently or maliciously, the bond was to be assigned to the party aggrieved, as a recompence for the injury he should have received*.

This statute is terminated by a declaration, That thenceforward no Farmer, Grazier, or Drover of cattle, or any person who then was, or had formerly been, a Receiver-general of Taxes granted by parliament, should be accounted a Bankrupt within any of the existing laws†. Although the legislature assigned no reason for this exception, yet we know that it was calculated to protect the interests of the Crown and of landlords of estates, whose claims upon these persons might materially have been affected by the operation of a commission. It seems rather doubtful, whether this was not an excessive

* § 7.

† § 8.

caution, as, in all probability, the Bankrupt laws did not extend to these characters. Being confined merely to those engaged in trade, it does not appear how such descriptions of men could have been included within them, their business being very little, if at all, connected with traffic or merchandize. After all, the exception could but indifferently answer the purpose for which it was intended; for although, as Farmers, Graziers, Drovers, and Receivers, they were excluded from the precincts of the Bankrupt laws, as traders in any other species of business they clearly were amenable to them; and so the Courts have on several occasions determined.

This act was to continue in force for two years, and thence to the end of the next session of parliament. It was afterwards continued for five years more, by the 7th of Anne, chap. 25.; and finally expired with its predecessor in the year 1716.

Upon the memorable affair of the insult offered to the Russian ambassador, in the year 1708, an act was passed for preserving the privileges of that order*. It was easily foreseen, that a bad use might be made of the protections thereby given to the appendages of foreign ministers, by the designing and fraudulent. To obviate this inconvenience it was therefore enacted, that no merchant or other trader, within the description of any of the statutes against Bankrupts, who might put himself into the service of any ambassador or public minister, should have, or take any manner of benefit by this act†.

An indulgence, similar to that which had been given to the Bank of England, was allowed to the South Sea Company, by the statute the 9th of Anne chap. 21‡.

* 7 Ann. c. 12. † § 5.

‡ See also 3 Geo. I. c. 9. 5 Geo. I. c. 19. 6 Geo. I. c. 4. 8. Geo. I. c. 20.

Here terminates the third period of the Bankrupt Laws, which we may consider as the utmost point of their extent. To the enlarged circumference of their jurisdiction, which they had received from the statute the 21st James I. chap. 19.; were now added a great accession of severity, and a number of additional regulations.

C H A P. V.

WE have already observed, that, where partial regulations are made to answer particular purposes, they rarely can be so framed as to produce the good which was expected from them. In proportion as they are formed without a regard to original principles, they are the more likely to prove inefficacious. This has evidently been the case, in all that multitude of statutes, which received the legislative sanction for the purpose of regulating the System of Insolvency. Sometimes the evil has manifested itself immediately; at other times it has remained a long time unsuspected, until at length it has undergone the fate of all such institutions, and has attracted the public notice by its serious and threatening consequences. The new Descriptions of Bankrupts, which were introduced by the statute the 21st James I. chap. 19. come under the latter class, and afford perhaps as strong an instance of the truth of our assertion as any which can be produced. They were not made incautiously, or without very ample consideration. They were calculated expressly to prevent the great increase of Bankrupts, and the various frauds invented and practised to elude the existing laws; to remedy the defects which were daily found in the former statutes, particularly in the description of a Bankrupt*. As time, however, is the test of truth, the experience of near a century evinced, that, instead of advantage, these new provisions had been

* Stat. 21 Jac. I. c. 19.

followed by the most ruinous consequences. To so great an height had they arisen, and so alarming were their effects, that in the year 1711, the Corporation of London, induced by the general complaint of its commercial inhabitants, presented a petition to the House of Commons, setting forth, that by the statute the twenty-first of King James I. it was enacted, That all and every person or persons using of trade by way of merchandize, or otherwise, by gross or retail, being indebted to any person or persons in one hundred pounds or more, who should not pay or compound for the same, within six months after due, and arrested for the same; or, being for such sum arrested, should procure his enlargement by bail; shall be adjudged a Bankrupt from the time of such arrest: that many inconveniences happened by reason of the said clause, the manner of becoming a Bankrupt being so very secret and private. They therefore prayed, that so much of the said statute as related to the premises might be repealed. This complaint appeared to be so well founded, that leave was immediately given to bring in a bill, according to the prayer of the petition*. After a considerable deliberation, the act of 11th Anne chap. 15 † was passed ‡.

This act went much farther than the prayer of the petition: it repealed the whole of the new description introduced by the act of King James II; with this proviso, that no sale or disposition of the estate of any person, within such description, or any distribution thereof, which had already taken place, should be impeached or frustrated, but that the same

* C mm. Journ. 25 Feb. 1711.

† This act appears in the statute book, as of the 10th year of the Queen.

‡ Comm. Journ. 2d April 1712. || § 1.

should

should be enjoyed as a satisfaction of the debts, for which it had been disposed or distributed *.

To clear up a doubt which had arisen upon the construction of the statute the 4th and 5th of Anne chap. 17, whether the discharge of a Bankrupt by virtue of that act should be held to discharge his partners from the same debt, it was further declared that it should not, but that they should still be liable, as fully as if the Bankrupt had never been discharged †.

At the same time that this act was passed, it was ordered, that a Committee should be appointed to consider the laws relating to Bankrupts; and to report their opinion to the House, what alterations therein might be proper to be made ‡. It does not appear that any steps were taken in consequence of this order. We can only collect from it, that the legislature was of opinion that the laws in question were inadequate, if not improper, and that a necessity existed for putting them upon a different footing.

On the 26th day of June, in the year 1716, the two statutes of the 4th and 5th of Anne chap. 17; and the 5th of Anne chap. 22. expired; in consequence of which, the System of Bankruptcy reverted nearly to its original situation. Whatever benefit might have been expected from them, was now at an end; the Bankrupt, or those who concealed his effects, were no longer liable to Death; nor, on the other hand, could he be intitled to the advantages of an Allowance or a Certificate. It should seem, that the legislature had made an experiment of these provisions, and had found them insufficient; it will be difficult otherwise to account for their being permitted thus to expire. Yet the subsequent conduct of Parliament

* § 2. † § 3.

‡ Comm. Journ. 2 Apr. 1712.

forbids this suggestion; for, as we shall find, they were not long after restored with additional sanctions. However this point may be determined, we may surely be permitted to conclude, that the mode which was pursued was of all others the least eligible. If the statutes were beneficial, they ought to have been continued or confirmed; if they were inexpedient, they ought not to have been restored by a following parliament.

One inconvenience ensued upon their expiration, which was too palpable not to have been easily foreseen, and which, if foreseen, might without any great difficulty have been prevented. The operation of these statutes was not momentary; it was extended throughout the whole process of a Bankruptcy, from the issuing of the commission to the allowance of the certificate. It followed therefore, that as commissions were perpetually issuing, there must have remained many, in every stage of their progress, on the day when these acts, subject to which they had been taken out, ceased any longer to have an influence. Of course, all such commissions must have stagnated; the interests of the creditors must have been materially affected, and the condition of the Bankrupts must have been highly distressful. Those who had surrendered on the faith of a parliamentary engagement, and who had in consequence delivered up the whole of their effects, must have been defeated of their promised allowance and certificate, and left to present indigence, and the eventual mercy of their creditors. Evident, however, as these mischiefs were, no public notice was taken of them, until the middle of the ensuing year, when a petition was presented to the House of Commons, by a number of persons who had been merchants and traders in the city of London, and had become Bankrupts. They alledged, that the Commissions against them
having

having been taken out before the expiration of the two acts, they had duly surrendered themselves, and had discovered and delivered up all their estates and effects to the Commissioners, for the benefit of their creditors; that several of them had obtained such Certificates as the acts required: but that a doubt had arisen with the Commissioners whether they had authority to make such Certificates, as the acts no longer existed. They, therefore, prayed, that a bill might be brought in, to empower the Great Seal to confirm such Certificates as were made by the Commissioners before that event*.

In consequence of this application, the statute of the 3d of Geo. I. chap. 12. was made; by which it was enacted, that all persons, against whom Commissions of Bankrupts had been issued after the 24th day of June 1706, and on or before the 26th day of June 1716, who had fully discovered and delivered up all their estate and effects, securities, books of account, and writings, to the Commissioners, according to the directions of the late acts, or who should, on or before the 25th day of December following, make such disclosure and delivery; should be intitled to, and receive all the benefits and allowances which had been given by those acts. And the Commissioners were empowered to make such Certificates as had been thereby directed, which were to be allowed and confirmed by the Great Seal, subject to any objections which might be made on the part of the creditors†.

It was further declared, that all persons who had become Bankrupt within the time above mentioned, and who should not so surrender themselves and deliver up their estate, effects, &c. on or before the said 25th day of December, should, to all intents and

* Comm. Journ. 16 May 1717. † § 1.

purposes,

266 CONSIDERATIONS ON THE

purposes, be deemed and suffer as felons, and be subject to all the pains and penalties contained in the former acts *.

As the clause in the statute, 4th and 5th of Anne chap. 17. § 11. relating to mutual credit between Bankrupts and others, had been found of great use, it was continued for seven years longer, and thence to the end of the next session of parliament †.

These regulations were very far from satisfying the commercial part of the nation, which found so little relief from them, that within half a year the House of Commons was again besieged with a multitude of petitions, from corporate bodies as well as from individuals. The first presented was from the Mayor, Aldermen, and Common Council of the city of London, setting forth, that, since the expiration of the acts of Queen Anne, several persons, against whom Commissions of Bankruptcy had issued, had refused to surrender themselves and their effects to their Creditors, or to make any discovery of their estate; but had privately conveyed away themselves and their property into secret places; whereby their creditors were deprived of any farther satisfaction of their debts, than what such persons should think fit to offer. It was also alledged, that people daily became Bankrupts, not so much by losses, as with intent to defraud their Creditors; which was a great damage to trade in general, and to the city in particular. They, therefore, prayed, that a bill might be brought in for the future prevention of these enormities. Leave for that purpose was accordingly given ‡.

Four other petitions were presented, all tending to prove the melancholy situation of traders, and particularly stating, that it was become usual for

* § 2. † § 3. ‡ Comm. Journ. 15 Jan. 1718.

Bankrupts

Bankrupts to take refuge in the Mint, or to fly beyond sea, whither they carried with them their property and books of account, and refused to come before the commissioners, or to surrender their effects, in defiance of their creditors: that through the excessive charges of commissions, and of the subsequent proceedings, the effects and estate of Bankrupts were, in most cases, swallowed up, and the creditors became considerable losers: that the commissioners, nominated in these commissions, being commonly attorneys, or persons of an inferior quality, and being under no obligation of an oath for the true and faithful discharge of their trusts, were apt to be very partial and dilatory in their proceedings, out of sinister ends of gain to themselves, to the prejudice both of creditor and debtor *.

These several charges having been proved to the satisfaction of the House, the statute the 5th of George I. chap. 24, was passed, for the purposes of putting an effectual stop to these alarming enormities, and to trace out such a mode of procedure as should, for the future, effectually prevent their perpetration. We will follow the framers of this act step by step, in order to form a just judgement of the propriety and the efficacy of these provisions.

After reciting the several reasons which gave rise to their interference, the legislature proceeded, in the first place, to compel the Surrender and the Discovery of the Bankrupt. It was enacted, That if any person against whom a commission shall issue, shall not, within thirty days after due notice, surrender himself to the commissioners, or to some of them, and submit to be examined, from time to time, upon oath, or, if a Quaker, upon solemn affirmation, by and before such commissioners, *and in*

* Comm. Journ. 19 & 20 Feb. 9 & 11 Mar. 1718.

*all things conform to the several statutes already made concerning Bankrupts; and who shall not fully and truly disclose and discover how, in what manner, to whom, and upon what consideration, he had disposed, assigned, or transferred, any of his goods, wares, merchandizes, money, or other effects or estate, and all books and writings relating thereto, of which he was possessed, or in or to which he was any ways interested or intitled, or which any person had in trust for him, or for his use; at any time before or after the issuing of the commission; or who should not deliver up to the commissioners all such part of his estate and effects, books and writings, as, at the time of his examination, should be in his custody (the necessary wearing apparel of himself, his wife, and children, only excepted), then that such Bankrupt, in case of any default or wilful omission therein, or in any of the premises, and being thereof lawfully convicted, by Indictment or Information, should be deemed, and should suffer as, a felon, without benefit of clergy *. And it was further enacted, That if any Bankrupt, or any other person by his order, or with his consent or privity, should remove, conceal, destroy, or embezzle, any part whatsoever of his property, to the value of twenty pounds or upwards, or any securities, writings, or books of account, every such person so becoming Bankrupt, and being thereof lawfully convicted, should be deemed, and should suffer as, a felon without benefit of clergy, and his goods and estate should be divided among his creditors †.*

These clauses were merely transcripts of the first sections of the Statutes 4th and 5th of Anne, c. 17, and 5th of Anne, c. 22, even to the same mistakes by which they had been disgraced. It will there-

* § 1.

† § 3.

fore be unnecessary to recapitulate those objections, which we have already made, and to which the reader may so easily refer.

One great impediment to the due execution of these laws was, the manifest risque which the Bankrupt ran of being arrested upon his appearing before the commissioners by any creditor, who did not chuse to come in under the commission, and who preferred, to the probability of receiving a ratable dividend, the chance of obtaining the whole of his demand, or the luxury of feasting his vengeance on the misery of his insolvent. Intimidated by the apprehension of being thus doubly punished, the Bankrupt naturally avoided the place, in which every step must have been attended with peril. For the prevention of this inconvenience it was therefore enacted, That the person of a Bankrupt should not be liable to any arrest for debt, or escape-warrant, in going to, staying with, or coming from the commissioners, in case he should attend them in obedience to their notice or summons; should he happen to be at any such time arrested, he was immediately to be discharged, on his producing to the officer such summons or notice, signed by the commissioners, and giving him a copy of it. In case any officer should be so hardy as, after this, to detain him in custody, he was to forfeit to the Bankrupt, for his own use, the sum of five pounds for every day he should be so detained *.

A power of enlarging the time of a Bankrupt's surrendering, for sixty days beyond the original thirty, was given to the Great Seal, exactly in the same manner as it had been given by the former act.

In order further to compel the appearance of the Bankrupt, a power was given to the judges of the several courts, and to all justices of the peace, upon the certificate of the commissioners that a commission had issued, and that the party had been found a Bankrupt, to grant their warrant for apprehending him, and to commit him to the common gaol, where he was to continue until the commissioners, upon notice of his apprehension, should send their warrant to bring him up: and the commissioners were authorized to grant their warrant for the seizure of his estate and effects, excepting only the necessary wearing apparel of himself, his wife, and his children *. These persons, so apprehended, were however intitled to all the benefits of this act, if they should afterwards submit to be examined, and should duly conform to its regulations †.

The commissioners were also empowered to convene before them, and to examine, all such persons, as they should have reason to believe capable of giving them any information of an act of Bankruptcy. In case of these persons neglecting to appear, or, on their appearance, refusing to be sworn or examined, they were to be committed to gaol, until they should submit ‡. They were there to be kept in close custody, until they should so comply, or should be discharged by the Great Seal; and a penalty of five hundred pounds (to be divided among the creditors) was denounced against any gaoler, who, during such interval, should suffer them to escape, or to go without the walls of the prison ||. A further penalty of one hundred pounds for the first offence, and double that sum for the second, was provided for any gaoler, who should refuse to produce any such prisoner, when duly requested so

* § 4.

† § 5.

‡ § 6.

|| § 7.

to do by a creditor *. It was however declared, That this process should not extend to compel any person to travel above twenty miles to be examined †.

All persons who had accepted of any trust, or who should conceal any estate or property of the Bankrupt, were made liable to a penalty of one hundred pounds, and double the value of the estate concealed (to be divided among the creditors), if they did not, within thirty days after the Commission issued, and after due notice given to them, disclose such trust and estate to the Commissioners, and submit themselves to be examined ‡. As an encouragement to such upright conduct, it was, on the other hand, provided, That all those, who would voluntarily come in, and make such discovery, should be allowed the sum of 3 per cent. upon the neat product of what should thereby be discovered §.

The same regulations, with regard to the amount of the petitioning creditor's debt, and the security for the due procedure under the Commission, which had been made by the Statute 5th of Queen Anne, c. 22, were here repeated and enforced ¶. As were also the precepts to the Commissioners to give notice of the Commission in the Gazette **, and to appoint three meetings †† of the Creditors at Guildhall, for the purposes of proving debts and chusing Assignees, to whom the Commissioners were to assign the Bankrupt's estate ‡‡. But it was further provided, That if it should appear that the Bankrupt, after the issuing the Commission, had paid, or otherwise had given, any goods, or other satisfaction, for his debt, to the person suing out the same, whereby he should privately have or

* § 8.

† § 6.

‡ § 9.

§ § 10.

¶ § 20.

** § 21.

†† § 42.

‡‡ § 21.

receive more in the pound, in respect of his debt, than the other creditors; *such payment of money, delivery of goods, or giving greater or other satisfaction, should be deemed and taken to be such an act of Bankruptcy, whereby, on good proof thereof, such Commission should be superseded*: and authority was given to the Chancellor, to award a new one to any Creditor who should petition for it. The person taking such goods, or satisfaction, was to forfeit the whole of what he might so receive, to be divided among the rest of the creditors under the new Commission *.

Although it may not be difficult to develop the intention of the legislature in this clause, yet surely the manner in which that intention is expressed betrays a negligence, or an ignorance, unworthy of so respectable an assembly. Before any Commission could properly be issued, an Act of Bankruptcy must have been committed. This, by its very essence, must have invalidated every subsequent transaction of the trader, of what species soever it might be. How then could a payment of money, or a delivery of goods, to a favourite creditor, be deemed an act of Bankruptcy, when some act must already have been committed, on which to ground the petition? Or how can any Commission be superseded, on the ground of this or any other Act of Bankruptcy having been committed?

Hitherto it had been customary for Commissions of Bankrupt, the Proceedings upon them, and the Depositions taken before the Commissioners, to be kept by the clerks or secretaries to the Commissioners. From this practice many inconveniences had arisen, and it was apparent that more might be apprehended. On the death of such persons, they

were frequently mislaid or lost; by means of which, purchasers under the commission were disabled from making out their titles to the estates they had bought. For want of some certain place, where creditors or other claimants might have recourse to the commission and the proceedings, infinite difficulties were experienced. Even in case they could be produced, they were not of record, nor could they be given in evidence. It was therefore enacted, that, on petition to the Great Seal, Commissions, Proceedings, Depositions, and Certificates, should be entered of record: that, in case of the death of the witnesses, or the loss of the originals, an authenticated copy of them should be given in evidence; unless, in the case of Certificates, it should be proved that they had been fraudulently obtained. The Lord Chancellor was directed to appoint a proper place, where all these matters should be entered of record, and to nominate a person to enter them*.

Among the other charges brought against the commissioners, we may recollect one which ascribes their partiality and misconduct, in a great measure, to the circumstance of their being under no obligation of an Oath. The charge was probably true, and gives us no small occasion to lament the blindness and the impiety of mankind. Can any one, who thinks at all, imagine that a less necessity exists for a conscientious discharge of his duty before the administration of an oath, than it does afterwards? Can the eternal order of things be changed, can that which was indifferent become criminal, by the formal pronouncement of a prescribed set of words? Justice and truth are immutable, they have existed from eternity without variation; the obligation in conscience to maintain them is the same, the punishment consequent

* § 30.

upon their breach will be the same, whether the name of God is ceremoniously invoked or not. It is perhaps objected, that, without this public engagement, the offender cannot be indicted for perjury; the laws of his injured country cannot take hold upon him. True—But in a Christian country are such morals to be found? is the sense of religion so weak, as to make this additional sanction essential for the preservation of probity? The all-seeing eye of Heaven, which reads the hearts of men, and searches out their most secret thoughts, will hereafter manifest this impiety. It will not then be sufficient for the trembling sinner to say, I was bound by no oath, and therefore have not offended by acting unjustly towards my neighbour. The power of truth will then be revealed, unsophisticated by human refinements; a heavy retribution will then be the portion of him, whose depravity could be restrained only by the dread of temporal infamy and punishment.

The course of experience had however proved, that those objects which were the nearest generally struck mankind most forcibly. Those who did not give themselves the trouble of considering what might happen to them hereafter, were easily intimidated by the certainty of the immediate interposition of an earthly tribunal. They were contented to run the risque of a vengeance which they could not see, but grew cautious when they reflected upon the calamities of a prison, or the terrors of a pillory. Oaths therefore, the breach of which would necessarily introduce these consequences, became the general preliminaries of judicial proceedings: and such has been the force of custom, that those, whom neither conscience nor honour can bind, are respected as judges, or believed as witnesses, when sanctified by the repetition of an hackneyed phrase, and by the mystical

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and unmeaning ceremony of kissing the outside of a book.

To comply with this general prejudice, the statute before us enacts, that no Commissioner shall be capable of acting, until such time as he shall have taken an oath, the formula of which is thereby given *. After this, he was to be deemed properly qualified to transact the business of the commission, and both the creditors and the bankrupt were to give him an unlimited credit for probity and impartiality.

The duty of the Commissioners was to maintain the due observance of the several Bankrupt Laws. But there were several particular circumstances, to which their attention was specifically called.

They were directed, where it should appear that a mutual credit had subsisted between the Bankrupt and any other person, previous to the issuing of the commission, to state the account, and to strike the balance between them †. They had a power of appointing provisional assignees, who nevertheless might be displaced at the meeting of the creditors, and who were to deliver up such part of the Bankrupt's estate as had come to their hands to the new assignees, under a penalty of two hundred pounds on their failure ‡. They were strictly prohibited from eating or drinking at the expense of either creditors or bankrupt; from taking above the sum of twenty shillings each for every meeting; above the same sum for executing any deed; or above the sum of ten shillings each for executing any warrant ||. This is the first regulation of their fees which we meet with. What had formerly been given to them, by whom, or out of what fund, does not appear. We may however collect, from the severity now annexed to a disobedience of this clause,

* § 32, 33.

† § 11.

‡ 23, 31.

|| § 13.

that their misconduct and rapacity must have been very great.

Although the legislature had taken cognizance of the choice of assignees, so far as to direct that they should be appointed by the creditors, no regulation had hitherto been made, as to the qualification necessary to entitle those creditors to a vote. Where a circumstance was depending, so material to the interests of those intitled to a satisfaction from the Bankrupt's effects, a general and indiscriminate power of chusing, which put every creditor upon a footing, without any distinction as to the quantum of his debt, must have been exceedingly impolitic. It would have thrown the weight into the wrong scale. Those who had the most trifling demand would have been upon a footing with the most interested creditor: a plurality of voices would have carried the point, without any attention to the proportion of the debts. It would have become an easy matter for the Bankrupt to fabricate a number of trifling claims, the commonness and unimportance of which would have rendered them difficult to disprove. The admission of these would have decided the choice of the assignees, and would have opened a door to a thousand different kinds of iniquity. To avoid this inconvenience, which now perhaps had begun to disclose itself, the statute provided, that no creditor should be permitted to vote in such choice, whose debt did not amount to the sum of Ten pounds or upwards, satisfactorily proved before the commissioners, and for which he had paid Contribution money.

The assignees, so appointed, were to manage the property of the Bankrupt. They were empowered to make compositions with his debtors; and to act in every respect in such a manner as might be

most conducive to the general interests of themselves and the rest of the creditors.

Where these two interests came in competition, it is no wonder that the former should frequently prevail over the latter. Whatever opinion might be formed of the integrity of an assignee, the severity of that integrity might relax, upon his finding himself in the full possession of the Bankrupt's property; and a desire of appropriating to himself what had been committed to his trust, might insinuate itself into a mind not too well guarded against such a temptation. Whether this did ever actually happen, is not for us in this place to assert. It is however by no means improbable. There is certainly some reason to suspect it, from the precaution which the framers of this act deemed it expedient to use. As it had (to use their words) and might again be found necessary and expedient to vacate such assignments, and to make a new assignment of the debts and effects unreceived and undisposed of, it was enacted, that the Chancellor might make an order for that purpose, and that the estate and effects of the Bankrupt should become legally vested in such new assignees.*

As an inducement to Bankrupts to conform to the directions of this act, the sum of five pounds *per cent.* (not exceeding in the whole the sum of two hundred pounds) was to be paid to them out of the produce of their estates; and they were to be discharged from all debts due by them at the time of their Bankruptcy†. But if, as in the former act, the estate should prove inadequate to the payment of eight shillings in the pound, the Bankrupt was to be allowed such sum of money as the assignees and the commissioners should think fit‡.

* § 24.

† § 14.

‡ § 15.

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These advantages were denied to all persons, who had given above one hundred pounds as a portion to any child upon his or her marriage; unless they should be able to prove that they were perfectly solvent at the time: and to every one, who had lost by gaming five pounds in any one day, or one hundred pounds in one year, preceding his bankruptcy *. Nor might the Bankrupt derive any of the above benefits from his conformity, unless it should be certified by the commissioners to the Chancellor; unless four parts in five in number and value of the creditors should sign the certificate, and testify their consent; unless the Bankrupt himself should make oath, that such certificate and consent were obtained without fraud †; and unless afterwards it should be confirmed by the Chancellor. As a farther precaution, it was provided, that all securities, given by a bankrupt to a creditor, as an inducement to sign his certificate, should be absolutely void ‡.

The same experience, which had suggested the above additions to the existing statutes, now dictated another. An artful Bankrupt, abusing the goodness of his creditors, had it frequently in his power to convert their generosity into the means of injuring them. Immediately upon his Certificate being confirmed, their power over him expired, and they had no method of compelling his attendance, for the purpose of elucidating obcurities, or of recovering his property. To reform this abuse, it was therefore ordained, that if a Bankrupt, having obtained his Certificate, should neglect or refuse to attend his Assignees, after a notice of fourteen days, he should be committed to prison without bail, until he should submit, or should be legally discharged §.

* § 19.

† § 16.

‡ § 17.

§ § 18.

Farmers, Graziers, Drovers, and Receivers of Parliamentary taxes, were again excluded from the benefit of Bankrupt Laws *. But, on the other hand, Bankers, Brokers, and Factors, were now drawn within their vortex †. Why these several denominations of men were thus particularly distinguished, is perhaps not easy to determine; as they appear, particularly the two former, to have been already included within the description of the act of 1st of James the First, c. 15.

The term, during which the act was to continue in force, was limited to the space of seven years, and thence to the end of the next session of parliament ‡.

After all the trouble the legislature had been at, they probably thought that, for seven years at least, they should continue unmolested by any fresh solicitations upon this subject. But experience has warranted us in saying, that there is a material distinction between an act of parliament and a satisfactory remedy. If they entertained this flattering expectation, they must very soon have been undeceived by various applications, which, within a very short time, implored their interference. In the next year they found themselves obliged to take cognizance of a grievance, which materially affected the very principle of those indulgences held out to the honest and unfortunate trader. So ready were the malevolent or revengeful to catch at any opening, which might favour their unwarrantable views, that even already many unhappy Bankrupts, notwithstanding they had made the prescribed discovery, had delivered up all their estate and effects, and had obtained their Certificates, which had been duly allowed and confirmed, had been taken in execution, and had been detained in prison, to the utter ruin of their families, on ac-

* § 28.

† § 27.

‡ § 29.

count of debts owing by them before they broke, and upon which judgements had been obtained before the allowance of their Certificates. It seems that a doubt had arisen, whether these poor men could be discharged out of confinement by virtue of the last act, without bringing a writ of Audita Querela, the charge of which they were incapacitated from bearing, after a total surrender of their property. To administer relief to these unprotected objects, it was enacted, by a clause in an insolvent act, of the year 1719*, that any one or more of the judges of the court wherein the judgement was obtained, upon the Bankrupt producing his Certificate properly allowed and authenticated might order any sheriff, bailiff, or gaoler, who should have the Bankrupt in custody upon such execution, to discharge him, without payment of any fee or reward.

While an attention was thus shewn to the interests of the Bankrupt, a very serious complaint on the part of the creditors was rising fast to attract legislative notice. From the inevitable effects of an enlarged commerce, and particularly from the state of the country, yet convulsed with the fatal South Sea project, merchants and traders found themselves unable to carry on business, or to dispose of their goods, without giving a considerable credit. In consequence of this they were obliged to take, instead of ready money, bills, bonds, promissory notes or other securities, payable at the end of three or six months, or even at a longer date. When the persons so bound happened to become Bankrupts, before the money so secured became payable, the creditors found themselves in a very disagreeable situation; for it was made a question, and with no small degree of plausibility, whether persons, giving credit on such

* Stat. 6 Geo. I. c. 22. § 26. *Stat. 6 Geo. I. c. 22. § 26.*
securities,

securities, should be admitted to prove their debts, or to take any dividend, before such time as their securities should become payable. As this threatened to prove highly detrimental to trade, and prejudicial to credit, a motion was made in the House of Lords, That the judges should be directed to prepare a Bill, for the purpose of remedying this grievance*. The order made upon this motion was much more general, and is a proof that the Peers were desirous of extending the reform: for the judges were directed to consider of the laws relating to Bankrupts, and to prepare a Bill, to remedy any defects which might be in those laws†.

What Bill they did prepare, or what alterations they proposed, we cannot now discover. But there must have been something extraordinary in them, to have justified the alarm of the Lord Mayor, Aldermen, and Commons of the City of London, who presented a petition to the House, setting forth their apprehensions, that, if the act should pass into a law, it would greatly affect, and prove very prejudicial to, the trade and credit, not only of the city, but of the whole kingdom‡. This petition was followed by another from a number of merchants, objecting to that part of the Bill which related to the Crown recovering its debts from Bankrupts§.

These remonstrances had their weight. The more extensive scheme of reformation was laid aside, and a very short and circumscribed statute was passed.

By this act, the 7th of George the First, chap. 31. it was enacted, that all persons, fairly and bona fide, giving credit to any one who shall afterwards become Bankrupt, on any bill, bond, note, or any other security, not due or payable at or before the time of

* Lords' Journ. 16 May, 1721.

† Ibid. 18 May, 1721.

‡ Ibid. 4 July, 1721.

§ Ibid. 6 July, 1721.

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such failure, shall be admitted to prove their securities, as if they had been made immediately payable, and shall be intitled to a ratable dividend, on deducting a rebate of interest, and discounting such securities at the rate of *5 per cent. per annum* *.

A similar justice was done to the Bankrupt. He was to be discharged from all such securities, and to receive the same benefit from the statutes, as if the money had been payable before the time of his Bankruptcy †.

So far the act was laudable. But, as if it had been impossible to make a Bankrupt law perfect and consistent, a third clause was added, by which it was declared, that no creditor of the above description should be competent, in respect of such a debt, to petition, or to join in any petition, for the obtaining or suing forth any commission, until such time as the debt should be actually payable ‡. Why any person, who was permitted to prove a debt to a sufficient amount after the prescribed deduction, should be prohibited from being a petitioning creditor, may perhaps not easily be accounted for. The regulation was certainly built neither on reason nor on justice; and where this foundation is wanting, the superstructure cannot be more estimable than it can be lasting.

The act of the 5th of George the First, the duration of which had originally been limited to the term of seven years, was afterwards continued by other statutes ||, to the year 1729, when it finally expired. With it terminated the fourth period of the Bankrupt System. It reverted nearly to the situation in which it had been left in the year 1623, re-trenched of the additional description of a Bankrupt,

* § 12.

† § 2.

‡ § 3.

|| 11 Geo. I. c. 29. 13 Geo. I. c. 27.

which

which was contained in the act the 19th of James the First, and augmented by the liberty given to creditors of proving securities not become payable. We proceed to the fifth and last period with additional satisfaction, as it affords us a prospect of concluding an enquiry, which, however necessary or useful, may perhaps, from the unavoidable dryness of the subject, have already too severely taxed the attention of the reader.

So far the act was laudable. But, as it had been impossible to make a Bankrupt law perfect and consistent, a third clause was added, by which it was directed, that no creditor of the above description should be competent, in respect of such a debt, to petition, or to join in any petition, for the obtaining or suing forth any commission, until such time as the debt should be actually payable. Why any person, who was permitted to prove a debt to a full extent, should be prohibited from being a petitioning creditor, was certainly built neither on reason nor on justice; and where this foundation was wanting, the superstructure cannot be more estimable than it can be lasting.

The act of the 11th of George the First, the date of which had originally been limited to the term of seven years, was afterwards continued by other statutes, to the year 1750, when it finally expired. When it terminated the fourth period of the Bankrupt system. It terminated nearly to the situation in which it had been left at the year 1703, respecting the additional description of a Bankrupt.

CHAP.

as ordered, that the Committee should be instructed to inspect the laws relating to Bankrupts, and to consider what alterations were proper to be made therein. It does not appear that any steps were taken in consequence of this direction. On the contrary, the number of bankrupts daily increased, until at length they found their way to the legislature.

C H A P. VI.

AFTER the recent experience which the legislature had had, of the inconveniences occasioned by the expiration of the statutes of Queen Anne, to all those Bankrupts, who, on the faith of a national engagement, had surrendered their whole property, it is surprizing that they should have provided so little by us, as to suffer a repetition of those inconveniences, loss which they appeared so strongly to feel. Yet certain it is, that in the year 1729, the statute the 9th of George I. was permitted to expire, without any intervention on the part of parliament, to protect those unfortunate men who had been the objects of it. Had no notice been taken of their situation, had the system of Bankruptcy been continued on the same footing on which it was then left, we might have concluded that the legislature disapproved of the late alterations; and, whatever we might have conceived of their sagacity, we must have been compelled to applaud their consistency. This however was not the case. They acknowledged the inconvenience; they expressed a wish to apply a remedy; they openly approved of the expiration of the recent statute, and immediately afterwards revived it. Posterity, unable to account for such an inconsistent conduct, will hardly credit the assertion. We proceed to prove it by the most authentic and indubitable evidence.

In the year 1728, we find, that upon a Committee being appointed in the House of Commons, to inspect what laws were expired or near expiring, it

was

was ordered, that the Committee should be instructed to inspect the laws relating to Bankrupts, and to consider what alterations were proper to be made therein *. It does not appear that any steps were taken in consequence of this direction. On the contrary, the miseries of Bankrupts daily increased, until at length they found their way to the legislature. In the year 1729, a petition was presented to the House, by a number of these unfortunate persons, alledging that in the years 1726 and 1727 commissions had issued against them, on which they had been found Bankrupts; that they had delivered up all their effects to their creditors, pursuant to the act of the late King, and had obtained certificates of four parts in five, in number and value, of their creditors, before the expiration of that act; that since, they had not been able to obtain the allowance of their Certificates by the Great Seal; that now their creditors bringing actions against them, although they had delivered up all their effects, they must starve in prison, unless relieved by parliament. They therefore prayed, that the House would take their case into consideration, and grant them relief †. This petition being referred to a Committee, and the several charges in it having been properly authenticated, the Committee appointed to inspect the expiring laws was directed to make some provision for the relief of the sufferers ‡. What provision they deemed expedient, will best appear from the statute passed in this session. By the 3d of Geo. II. chap. 29. sect. 4. it was enacted, that every person who had been adjudged a Bankrupt on or before the 14th of May preceding, should

* Com. Journ. 13 Feb. 1728. In the year 1728, we find that a Committee was appointed in the House to inspect what laws were expired and indubitable evidence.

† Com. Journ. 24 Feb. 1729.

‡ Ibid. 26 Mar. 1730.

be intitled to the relief and discharge from his debts, and to the other benefits and advantages, and should be subject and liable to all the penalties of the act of the late King. The Chancellor was directed to proceed, with regard to them, in the same manner as if that act had continued in force. And all actions brought against them, for any debts contracted before their bankruptcy, were to be discharged, after the allowance of their certificates.

By this public declaration, by this restoration of the late act, parliament seemed to express its entire approbation of it. Evident, however, as this may appear, we must not too hastily adopt this opinion: for very different were their real sentiments. By some refinement of reasoning, which greatly surpasses our limited understanding, they reconciled an apparent absurdity, if not a direct contradiction. They gave new force to all the regulations of the act, and then, as if afraid of having done wrong, as if desirous of recovering from a false step, they immediately subjoined a clause*, by which they declared, that nothing in the preceding section contained should be construed to revive the said act, save only as to such abovementioned Bankrupts.

— mea cum pugnat sententia secum;
Quod petit, spernit; repetit quod nuper omisit;
Æstuat, et vitæ disconvenit ordine toto;
Diruit, ædificat, mutat quadrata rotundis;
— Insanire putis solemnia me. — Neque rides?

In the year following, they again changed their minds, and leave was given to bring in a bill, for preventing frauds committed by Bankrupts†. A bill was accordingly prepared, and passed the House of Commons‡. It was thence sent to the House of

* § 5. † Comm. Journ. 5. Apr. 1731. ‡ Ibid 28 Apr. 1731.

Lords, where it was twice read*: but the parliament being soon after prorogued, it came to nothing.

This, however, was but a temporary suspension of the legislative pleasure. For, in the next session, an act was passed, which merits our serious attention, as the final resolution of parliament upon this subject. The statute the 5th of Geo. II. chap. 30. has ever since been the great directory in all proceedings relative to Bankrupts.

The preamble of this statute, containing a representation of the evils which had occasioned this legislative interference, affords us an high-coloured though melancholy picture of the mischiefs, inevitably consequent on an imperfect partial system. It informs us, that Commissions having been issued against divers persons, both before and since the expiration of the 5th of Geo. I. they had been declared Bankrupts, but, by reason of the expiration of such statute, they had not only refused to surrender themselves to the Commissioners, and to discover and deliver up their estate and effects, but had carried away and concealed the same, to the manifest injury of their Creditors, and to the great discouragement of trade. It further tells us, that many evil-minded persons had, since the expiration of that statute, bought and taken upon trust and credit great quantities of goods and merchandizes, and had thereby, and by their extravagant manner of living, and otherwise, contracted great debts; and, having gotten such goods and effects into their custody, had sold or pawned the same for less than the value thereof, for the purpose of raising ready money; and had withdrawn themselves, with their effects, from their usual places of abode into secret

* Lords' Journ. 29 April, 1731.

places, in order to oblige their Creditors to accept such composition for their debts as they might be inclined to offer. Some ill inclined persons had carried away their effects beyond the seas, whereby their creditors had been totally deprived of their debts; and others daily became Bankrupts, not so much by reason of losses and other misfortunes, as with an intent of obliging their creditors to accept their unjust proffers and compositions, and to defraud and hinder them of their just debts.

To remedy and to prevent these abuses, the statute made a number of provisions, contained, without much regularity, in forty-nine sections. Of these we proceed to consider the most material.

Any person becoming Bankrupt, against whom a Commission shall issue whereupon he shall be declared a Bankrupt, not surrendering himself to the Commissioners within two and forty days after personal notice, or after notice in writing left at his usual place of abode, and notice given in the London Gazette, and not signing or subscribing such surrender and submitting to be examined, from time to time, upon oath or affirmation, and not in all things conforming to the several Bankrupt acts, and not making a full disclosure and discovery of all his estate and effects real and personal, and how, when, to whom, and in what manner, he may have disposed, assigned, or transferred the same or any part thereof, or the books, papers and writings relating thereto; and not delivering up to the Commissioners all such part of his goods, merchandizes, money, estate and effects, and all books, papers, and writings, relating thereto, as, at the time of such examination, shall be in his custody or power (the necessary wearing apparel of himself, his wife and children, only excepted) then “such Bankrupt, in case
“ of any default or wilful omission in not surrendering
“ and submitting to be examined, as aforesaid, or in
“ case

“ case he shall remove, conceal, or embezzle, any
 “ part of such of his estate, real or personal, to the
 “ value of twenty pounds, or any books of account,
 “ papers or writings relating thereto, with an intent
 “ to defraud his creditors (and being thereof law-
 “ fully convicted by Judgement or Information)
 “ shall be deemed and adjudged to be guilty of
 “ Felony, and shall suffer as a felon without benefit
 “ of clergy.” The goods and estate of such Bank-
 rupts shall be divided among the Creditors under
 the Commission*.

The reader will perceive, that this clause is nearly the same with that contained in the preceding act of the 5th of George the First. The sanguinary spirit of legislation had now become familiar to the constitution. Whenever the framers of a law found themselves at a loss to prevent what they wished effectually to prohibit, they enacted the penalty of death. It was no longer considered, whether the original compact of society gave them such a power, whether such severity was not rather tyrannical than just; from the trouble of these considerations, modern legislators were glad to be delivered; the application of such a summary remedy was obvious, and spared them the fatigue of reflection; by the expedient of prescribing a capital punishment for a civil offence, they cut, like Alexander, that Gordian knot, which they found themselves incapable of untying.

In this instance, however, parliament frustrated its own intention. Not satisfied with denouncing this formidable penalty, which, however disproportionate it might have been, the executive power would undoubtedly have enforced, the framers of this law undertook to chalk out certain modes of prosecution, by which the operation of the foregoing clause was

* § 1.

to be conducted. These modes were two; Judgement and Information. By these, and by no others, was the operation of the clause to be conducted. If they were both insufficient, if by neither of these modes, a man could be tried for a capital offence, the intention of Parliament was certainly frustrated.

There cannot be a more evident rule of law, than that, where a statute creates a new offence, which was not prohibited by the common law, and where it appoints a particular manner of proceeding against the offender, without mentioning an Indictment, an Indictment cannot be maintained on such a statute, because by mentioning the other methods only it is impliedly excluded *. It is also universally acknowledged, that penal laws shall be construed strictly. By these rules let us examine the clause in question:

This statute creates a new offence. At the time when it was passed, no law existed, whereby a fraudulent Bankrupt could be capitally punished. The two acts of Queen Anne, and the act of George I. were expired. The offence of fraudulent Bankruptcy was not cognizable at common law, nor could an Indictment for it have been maintained. This statute appoints a particular manner of proceeding against the offender. Of Informations we have already spoken †: it is sufficiently evident, that by an Information no man can be tried for a capital offence. What mode of procedure a Judgement may be, we profess ourselves utterly ignorant. This we know, that both our law and our courts of justice are, and ever have been, strangers to such a species of action. Judgement indeed is the consequence of every mode of process; but no man can be tried or be convicted by a Judgement. As these two modes,

* Hawk. Pl. Cr. b. 2. c. 25. § 4.

† Supra, chap. 4.

however,

however, are particularly prescribed by the statute, as, in consequence of such prescription, an Indictment cannot be maintained; and as by neither of these modes the offender can be prosecuted, it follows, that the whole provision is absolutely void. It is not enough to say, that the intention of the legislature is evident, that the word Judgement is plainly a mistake. As penal laws are to be construed strictly, such mistakes are extremely important, where the object of a law is to condemn a citizen to death. If there is no such mode of procedure as that by Judgement, if no man can be capitally convicted on an Information, this clause is a nullity; no man can legally be doomed to death upon it; and if any man should be convicted and be executed upon it, the judge, who pronounces the sentence and signs the warrant, will be guilty of Murder. Yet, on this very clause, have Two Bankrupts been executed. In the year 1756, Alexander Thompson, an embroiderer, was hanged for not surrendering to his commissioners; and, in the year 1761, John Perrot, a linen draper, was executed for concealing his effects.

To shew that this is not the only instance of such a legislative error, and to prove that such errors are really essential, it may not be improper to mention, that, at the Spring Assizes for the County of Surry, 1762, two persons were tried for defrauding their creditors, by taking the benefit of the compulsive clause in the Insolvent Act, the 1st of George the Third, c. 17. § 46. They were acquitted, in consequence of a discovery that a mistake had been committed in penning that section, the word Judgement having been inserted therein, instead of the word Indictment*.

* Green's Bankr. 227.

Unhappily for society, this parliamentary mistake is no longer a secret. Bankrupts know that they are not liable to death for their contumacy or their frauds. They are satisfied that, in future, no judge will dare to condemn any man to death on this clause, and they triumph in the audacity of unchecked villainy. Strange indeed it is, that the legislature should so long have permitted this error to disgrace the national code. Wise laws are valuable, and promote the interests of the community; impotent and absurd constitutions give encouragement to iniquity, and induce a contempt for that authority, which no longer is respected as infallible.

Subjoined to this clause is a proviso, by which it is enacted, that the Great Seal shall have power to enlarge the time of a Bankrupt's surrendering, and of his disclosure and discovery, for any time not exceeding fifty days, to be computed from the end of the original forty-two days; the order for such enlargement being always made at least six days before the expiration of that time*.

When the legislature framed this clause, it probably was not aware, that it was putting a weapon into the hands of a Bankrupt, by which he would be enabled to destroy the whole effect, whatever that might be, of the preceding rigorous institutions. Yet so it was. However fraudulent a Bankrupt may be, however greatly he may deserve the rigour of the laws, he has it in his power to escape from punishment, by the easy expedient of presenting a petition to the Great Seal, which is considered as a matter of course, and to which, as a matter of course, the Chancellor never refuses his signature. As, in the case of all penal laws, a strictness of construction is ever to be maintained, no penalty can await

* § 3.

the Bankrupt, who shall have procured such an enlargement of his time. The whole of these penalties, supposing them to have any force, are confined to the circumstance of his neglecting or refusing to appear, and to fulfil his other duties, before the expiration of the forty-second day. Beyond that period they do not reach, nor can they be enforced against him. Upon an examination of several Commissioners of Bankrupts before the House of Commons in the year 1759, it was asserted by Mr. Capper, that he had heard of a trial of that kind, and of an acquittal upon it, at the Old Baily; that he was concerned as counsel in that Bankruptcy before the Lord Keeper, and was told by the Solicitor, that, upon the like exception, the party was acquitted*.

Can the laws of any country afford us a similar instance of such a complication of mistakes? Can we without a blush confess, that, in a matter of the most serious importance to the commercial interests and to the morality of this country, so erroneous, so impotent, and so absurd, are the Laws of England?

After this, the reader may deem that time mispent, which he shall bestow on the farther consideration of this statute. It may not however be amiss briefly to mention those other provisions, which at present constitute the ordinary process in cases of Bankruptcy.

The Bankrupt is commanded to deliver upon oath to his Assignees all the books of account, papers, and writings, in his custody or power, which may relate to his estate or effects, and to discover all such as may be in the custody or power of others. He is to attend his Assignees, on being duly required so to do, to assist them in making out his accounts†. He shall be at liberty to inspect his books and pa-

* Comm. Journ. 2. Jun. 1759.

† § 4.

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pers, in the presence of Assignees, and to make extracts from them. In coming to surrender, and afterwards during the forty-two or the fifty days, he shall not be liable to be arrested by any of his creditors. If he shall be so arrested, on producing to the officer his summons, duly signed by the commissioners, or his assignees, and on giving him a copy of it, he shall immediately be discharged. If the officer shall still detain him, he shall forfeit to the Bankrupt, for his own use, five pounds for every day he shall keep him *. If a Bankrupt shall be in prison, at the time of issuing the commission, the expence of bringing him before the commissioners shall be defrayed out of his estate and effects; if he shall be in execution, the commissioners shall attend him in prison †. In case the Bankrupt shall duly surrender and conform, he shall be allowed the sum of 5 *per cent.* out of the neat produce of his estate, in case it shall be sufficient to make a dividend of ten shillings in the pound; of seven and an half *per cent.* if it shall be sufficient to divide twelve shillings and sixpence in the pound; and of 10 *per cent.* if it shall suffice for a dividend of fifteen shillings in the pound; provided, that such allowance shall not, in the first case, exceed Two Hundred Pounds; in the second, Two Hundred and Fifty; nor, in the third, Three Hundred Pounds: and every such Bankrupt shall be discharged from all debts, owing by him at the time of his Bankruptcy ‡. If the neat produce of his estate shall not prove sufficient to pay to all his Creditors ten shillings in the pound, he shall be allowed and paid by the Assignees so much money as they and the commissioners shall think fit, not exceeding three pounds *per cent.* || Where any person shall already have been discharged by virtue of this act, or shall have

* § 5.

† § 6.

‡ § 7.

|| § 8.

compounded with his creditors, or, on delivery of his estate and effects, shall have been released by them, or shall have been discharged by any Insolvent Act, his future estate and effects shall remain liable to his creditors, (his tools of trade, his necessary household goods and furniture, and the necessary wearing apparel of himself, his wife, and children, only excepted), unless the dividend of his estate under the commission shall amount to fifteen shillings in the pound. No Bankrupt can be intitled to the benefit of this act, who shall have advanced on the marriage of any child more than One Hundred Pounds, unless he shall be able to prove, that he had, at the time, sufficient to pay all his creditors their full debts: or if he shall have lost, in any one day, the sum of Five Pounds, or, in the whole, the sum of One Hundred Pounds within a year before his Bankruptcy, by any species of gaming, either public or private †. If, after due allowance of his Certificate, any Bankrupt shall be taken in execution, or be detained in prison, on account of any debt owing before his Bankruptcy, any judge of the court wherein the judgement was obtained may order the officer or gaoler, on production of the Certificate, to discharge the Bankrupt out of custody, without payment of any fee or reward ‡. On the Certificate of the Commissioners, any Judge or Justice of the Peace is empowered to issue his warrant for the apprehension of a Bankrupt not conforming, and for his commitment to gaol; and the Commissioners are authorized to seize any of his estate or effects, books or papers, which may be in his possession in such prison ||, But, if a Bankrupt so apprehended shall conform, he shall be intitled to all the benefits of this act **.

* § 9.

|| § 14.

† § 12.

** § 15.

‡ § 13.

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Notwith-

Notwithstanding the allowance of his Certificate, a Bankrupt shall be bound to attend his Assignees, for the purpose of making up his accounts, and to attend in any Court of Record, in order to be examined touching the same; for which attendance he shall be allowed two shillings and sixpence *per diem*. If he shall neglect or refuse to attend, or, on attendance, to assist in such discovery, he shall be liable to imprisonment until he shall duly conform*.

The Commissioners are to appoint, within the forty-two days, not less than three several meetings, for the purpose of the Bankrupt's surrender and conformity, the last of which shall be on the said forty-second day†.

To prevent Commissions of Bankrupt from being maliciously taken out, it was enacted, that no commission shall be issued, unless the debt of a single petitioning creditor, or of two or more being partners, shall amount to One Hundred Pounds, or unless the debt of the two petitioning creditors shall amount to One Hundred and Fifty Pounds, or unless that of three shall amount to Two Hundred Pounds or upwards. The petitioning creditor, previously to the commission being granted, shall make an affidavit or solemn affirmation of the truth of his debt; and shall give a Bond to the Great Seal, in the penalty of Two Hundred Pounds, to be conditioned for proving his debt, as well before the commissioners as upon a trial at law, should that happen, for proving the party a Bankrupt at the time of taking out the commission, and for proceeding properly in the commission. If he shall fail in these points, the Chancellor shall assign his bond to the injured person, as a satisfaction for the wrong done him‡.

* § 36. 7

† § 2.

‡ § 23.

A custom having crept into use, for a creditor to take out a commission, by means whereof he was enabled to intimidate his debtor, and to extort from him the whole or a great part of his debt, or his goods, or other security; to prevent such an improper abuse, it was declared, that if any Bankrupt shall, after the issuing of a commission against him, pay or give to the petitioning creditor any goods, satisfaction or security, for his debt, whereby he shall privately receive more in the pound than the other creditors, such payment or delivery "shall be deemed and "taken to be such an Act of Bankruptcy," whereby, on good proof thereof, such commission shall be superseded; and a new commission shall be issued to any creditor petitioning for it. The offending creditor shall forfeit his whole debt, and shall restore what he unduly received, to be divided among the other creditors*.—We see here the same absurdity repeated, of which we have already taken notice, in our observations on the twenty-sixth section of the Stat. 5 Geo. I. c. 24 †.

After the commissioners have declared a Bankruptcy, they shall publish it in the Gazette, and shall appoint a time and place for the creditors to meet; (which place, for all town-commissions, shall be the Guildhall of the City of London), in order to chuse an Assignee or Assignees of the Bankrupt's estate and effects: at which time the Commissioners shall admit the Creditors to prove their debts, and shall assign the Bankrupt's property to such person or persons as the major part in Value of such creditors, whose debts shall amount to the sum of Ten Pounds or upwards ‡, shall chuse. Such Assignees shall be obliged to keep one or more distinct book or books of account, of the money or effects recovered from

* § 24.

† See Supra, cap. 5.

‡ § 27.

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the Bankrupt's estate; to which every Creditor, having proved his debt, shall, at seasonable times, have free resort *.

The expences of a commission shall be defrayed by the petitioning creditor, until an Assignee shall be chosen. At the second sitting, the Commissioners shall tax these costs, and shall direct the Assignees to reimburse them to the petitioning creditor, out of the first monies to be received by them †.

Every creditor shall be at liberty to prove his debt under the Commission, without paying Contribution Money, as had formerly been the custom ‡.

No Commission shall abate on the death of the King. If it shall for any reason be necessary to renew any Commission, on such renewal only half of the usual fees shall be paid ||.

The Commissioners are authorized to appoint a Provisional Assignee, removeable at the second meeting by the Creditors intitled to vote. On such removal, he shall deliver up and assign all the estate and effects of the Bankrupt, come to his hands, to the new Assignees. If he shall neglect or refuse so to do, by the space of ten days after due notice of such new choice, he shall forfeit the sum of Two Hundred Pounds, to be divided among the Creditors **. Public notice of such removal, as well as of every other removal of Assignees (which the Chancellor is authorized to order on petition) shall be given in the two London Gazettes immediately following ††.

With the consent of the major part in value of the Creditors under the Commission, the Assignees are empowered to submit differences and disputes to arbitration ‡‡, and to compound with the Bankrupt's debtors, taking such reasonable part as can upon

* § 26.

† § 25.

‡ Ibid.

|| § 45.

** § 30.

†† § 31.

‡‡ § 34.

such

such composition be gotten, in full discharge of the debt or account *. Without the same authority, no Assignee can be justified in commencing any suit in Equity †.

Where it shall appear to the Commissioners, that a mutual credit has existed between the Bankrupt and any other person, or that mutual debts subsist between them, at any time before the Bankruptcy, they or the Assignees shall state the account, and shall set one debt against another. What shall appear to be due on either side, on the balance of such account, and no more, shall be claimed or paid on either side respectively ‡.

If any person shall swear or affirm that any sum of money is due to him from the Bankrupt, which in fact is not due, or that more is due than is really owing, he shall, on conviction, suffer the pains and penalties denounced against wilful perjury, and shall moreover forfeit double the sum so sworn to be due §.

The reader will recollect, that the statute the 7th of George the First, c. 31. which had enabled persons taking bills, bonds, notes, or other personal security for their money, payable at a future day, to prove their debts under a commission, had also rendered such creditors incapable of petitioning, or of joining in any petition for a Commission. Common sense must always have pointed out the impropriety of such a provision; experience had proved it to be inconvenient. It was therefore by this act repealed; and the legislature declared, that such creditors should for the future be permitted to become Petitioning Creditors **.

For the purpose of effectually getting at the property of the Bankrupt, various regulations were

* § 35.

|| § 29.

† § 38.

** § 22.

‡ § 24.

framed. The Commissioners were impowered to examine either verbally, or on interrogatories in writing, not only the Bankrupt, but any other person summoned before, or present at, their meetings, touching all matters relating to the person, trade, dealings, estate, and effects of the Bankrupt, or any act of bankruptcy committed by him. They are directed to reduce to writing the answers of such persons, which the party examined is required to subscribe. If any person shall refuse so to answer, or shall not answer fully, or shall refuse to sign his examination (without some reasonable objection), the Commissioners shall commit him to such prison as they shall think fit, there to remain, without bail or mainprize, until such time as he shall submit, and make and subscribe a full answer *. In every such case the Commissioners shall, in their Warrant of Commitment, specify the question or questions proposed †. If the prisoner shall bring a Habeas Corpus for his discharge, no insufficiency in the form of the Warrant shall be regarded; but the Judge shall recommit him, unless he shall make it appear, that he has answered the questions proposed; or unless he shall be of opinion, that the party committed had sufficient reason for refusing to sign his examination. If any gaoler shall suffer such prisoner to escape, or to go without the walls, until he shall be discharged, he shall forfeit Five Hundred Pounds, for the use of the creditors ‡. Or if he shall refuse to produce him to any creditor, on his shewing the Commissioner's Certificate of his having proved his debt, he shall forfeit the sum of One Hundred Pounds, for the use of the Creditors ||.

Every person, voluntarily discovering any part of a Bankrupt's estate, shall be allowed 5 *per cent.* and such

* § 16.

† § 17.

‡ § 18.

|| § 19.

ether

other reward, as the Assignees and the majority of the creditors shall think fit *. On the other hand, every person, who shall have accepted of any trust, and shall wilfully conceal or protect any real or personal estate of a Bankrupt from his Creditors, and shall not, within forty-two days after the issuing of the Commission, and notice thereof given in the London Gazette, disclose in writing such trust and estate to the Commissioners or Assignees, and submit himself to be examined, shall forfeit the sum of One Hundred Pounds, and double the value of the estate concealed, for the use of the creditors †.

At the time when this statute was passed, some experience had been had of the inconveniences, which naturally arose from the method prescribed for the choice of Assignees. It was already discovered, that dividends were frequently delayed by assignees, who applied to other purposes the monies lodged in their hands. This, though by no means the greatest evil which has arisen from this method, was yet sufficiently serious to require the attention of Parliament. To prevent it, it was enacted, that, previously to any choice, the majority in value of the creditors present should, if they think fit, direct in what manner, how, with whom, and where, the monies arising from the Bankrupt's estate shall be deposited until a dividend. To this direction every assignee is enjoined to conform, so often as one hundred pounds shall be in such manner received ‡.

The following is the method prescribed for the distribution of the Bankrupt's estate.—After the expiration of four months, and within twelve months after the issuing of the Commission, the Assignees shall give twenty-one days public notice in the Gazette of a meeting for the dividend. At which

* § 20 † § 21. ‡ § 32.

meeting (which, for town commissions, shall be at Guildhall) creditors shall be permitted to prove their debts. The assignees shall produce their accounts, to the truth of which they may be examined upon oath or affirmation. In these accounts, they shall be allowed all sums expended in suing forth and prosecuting the commission, and all other just allowances; and such part of the residue of the neat produce of the Bankrupt's estate, as the Commissioners shall direct, shall be divided pro rata among those creditors who shall have duly proved their debts. The Commissioners shall make in writing an order for the dividend, which shall contain an account of the place and time of its being made, the quantum of the debts proved, the sum total remaining in the hands of the assignees to be divided, and how much in the pound is then ordered to be paid. One part of this order shall be filed among the proceedings under the Commission, and each Assignee shall have a duplicate. In pursuance of this order, and without any deed of distribution, the assignees shall make the dividend, and shall take receipts from each creditor, in a book to be kept for that purpose. Such order and receipt shall be a full discharge to the assignee, for so much as he shall fairly pay *.

Within eighteen months after the issuing of the Commission, the assignees shall make a second dividend, in case the whole of the estate was not expended on the first, and shall advertize it in the Gazette. At this meeting also creditors may prove their debts. The assignees shall again produce, on oath or affirmation, their accounts; and the Commissioners shall order a dividend. This dividend shall be final, unless any suit at law shall be depending, unless any part of the estate shall remain undisposed of, or unless some future estate or effects of the Bank-

rupt shall come in. In this latter case, the assignees shall immediately convert it into money, and, within two months afterwards, shall divide it among the creditors *.

Nothing shall intitle a Bankrupt to the benefits allowed by this act, unless the major part of the Commissioners shall certify, in writing, to the Great Seal, that he has made a full discovery of his estate and effects, that he has in all things conformed himself to the directions of this act, and that there does not appear to them any reason to doubt of the truth or of the fullness of such discovery. Previously to this attestation, four parts in five in number and value of the Bankrupt's Creditors, who shall have proved their debts, and whose debts shall respectively amount to at least twenty pounds, shall sign, and shall testify their consent to such allowance and Certificate, and to the discharge of the Bankrupt. Of these signatures the Commissioners shall have proof by affidavit, before they shall certify. Such affidavit, every warrant by which any creditor may have authorised another to sign for him, and the certificate, shall be laid before the Great Seal for its confirmation and allowance. The Bankrupt shall make oath, or solemnly affirm, that such certificate and consent were obtained without fraud. The Certificate shall then be confirmed by the Great Seal, if no creditor shall alledge, on a hearing, a sufficient objection †.

With a view of preventing the improper obtaining of Certificates, it was further declared, that every species of security, given by a Bankrupt, or by any other person, to the use of or in trust for any Creditor, or for the payment of any debt due from the Bankrupt at the time of his Bankruptcy, or after-

* § 37.

† § 10.

wards,

wards, as a consideration to induce him to consent to, or to sign the allowance or Certificate, shall be utterly void *.

Persons dealing as Bankers, Brokers, and Factors, are declared to be liable to the Bankrupt Laws; and Farmers, Graziers, Drovers of cattle, and the Receivers-general of the taxes granted by act of parliament, are excluded from them †.

Before the Commissioners shall proceed to act in any commission, they shall respectively take, and administer to each other, an oath for the just discharge of their duty; a memorial of which, signed by them, shall be kept among the proceedings ‡.

To prevent the great and unnecessary expence of suing out and prosecuting commissions, which were found to be extremely prejudicial both to the Bankrupt and to the Creditors, it was declared that no schedule should be annexed to any deed of assignment; that no monies should be paid or allowed by the creditors, or out of the estate, for the expences of the Commissioners, or of any other persons, in eating and drinking at any meeting; and that if any Commissioner shall order such expence to be made, or shall so eat and drink at the charge of the Creditors or of the estate, or shall respectively take above the sum of twenty shillings for each meeting, he shall be for ever disabled to act as a Commissioner||. It was further declared, that all bills of fees or disbursements, claimed by the solicitor employed under the Commission, shall be settled by a Master in Chancery, who shall be intitled to twenty shillings for his trouble **.

A new provision was made for entering all the proceedings on record ††, similar to that which had

* § 11.

|| § 42.

† 39 and 40.

** § 46.

‡ § 43 and 44.

†† § 41.

been provided by the statute 5 Geo. I. c. 24. §. 30. And it was declared, that this act should continue in force for the space of three years, and thence to the end of the then next session of parliament*.

This act has since been continued by a number of statutes †, and finally was continued until the twenty-ninth day of September 1785, and thence to the end of the then next session of parliament, by the 21st Geo. III. chap. 30. § 8.

During the period which has elapsed since this act was passed, several circumstances have occurred which deserve our attention. The nation soon discovered, that the advantages to be derived from it did not, in reality, equal the expectations which they had formed. Frauds still continued; bankruptcies were not less frequent, credit received no support, nor were honest traders protected.

Within a year after this act was framed, an inconvenience was experienced in the mode prescribed for granting Certificates. Bankrupts had already fallen upon contrivances to elude the letter of the law, and to turn against creditors that instrument which had been intended for their benefit. To remedy this, a bill was brought into the House of Commons in the session of 1733 ‡. It was sent to the Lords, where it was read twice; but, as the parliament was soon after dissolved, no farther steps were taken in the business ||.

In the year 1746 another grievance presented itself. Traders and persons liable to the Bankrupt-

* §. 49.

† 9 Geo. II. c. 18. § 2.—16 Geo. II. c. 27.—24 Geo. II. c. 57. § 8.—31 Geo. II. c. 55. § 2.—4 Geo. III. c. 36.—12 Geo. III. c. 47.—16 Geo. III. c. 54.

‡ Comm. Journ. 11 Mar. and 21 Mar. 1733.

|| Lord's Journ. 5 and 10 Apr. 1733.

acts devised a new species of fraud, by committing secret acts of Bankruptcy, which those, with whom they were concerned in business, could not know; after which, they continued to appear publicly, and to trade, to buy and sell, to draw, accept and negotiate bills of exchange, and to pay and receive money on account thereof, in the customary way, and as openly as if they had still been solvent persons, and had not become Bankrupts.

This was an evil which necessarily sprung from the invention of specific acts of Bankruptcy. The unjust Insolvent would naturally have recourse to an expedient, which so certainly would enrich himself and defraud others. Such a device effectually avoided every intermediate transaction; for, at the instant when an act of Bankruptcy was committed, the trader ceased in law to be competent to execute any of these transactions. The natural consequences were, an immense discouragement to trade, and an alarming prejudice to credit. To remedy these evils, which, we may safely affirm, never satisfactorily can be prevented, so long as a necessity for specific acts of Bankruptcy shall continue, the statute the 19 Geo. II. c. 32 was made. By this it was enacted, That no person, really and *bonâ fide* a Creditor of any Bankrupt, for or in respect of goods really and *bonâ fide* sold to him, or for or in respect of any bill of exchange really and *bonâ fide* drawn, negotiated, or accepted by such Bankrupt, in the usual and ordinary course of trade and dealing, shall be liable to refund to the assignees any monies fairly received by him, before notice of his becoming Bankrupt, or of his being in insolvent circumstances.

At the same time when this provision was made, the legislature took the opportunity of settling a doubt which had lately arisen. As merchants and other traders frequently lent money on bottomry, or

at respondentia, and caused their ships, and the goods and merchandizes loaden thereon, to be insured; when commissions of Bankruptcy issued against the obligor in such bottomry, or respondentia bond, or against the underwriter in such assurance, prior to the loss of the ship or goods, it had been made a question, Whether the obligee or the assured should be permitted to prove their debts, or to receive any dividend under the commission. The legislature adopted that decision, which common sense and natural justice had dictated. It was declared, That such obligees or assured should be permitted to claim, and, after the contingency should happen, to prove their debts, and to receive a dividend of the Bankrupt's estate *.

The business of Certificates, which had already attracted the notice of parliament, again employed its attention in the year 1751. It had been discovered, that many abuses had been committed by Bankrupts, and by persons, who, with their privity, had attempted to prove fictitious and pretended debts under commissions, for the purpose of enabling them to sign their consent to the Bankrupt's certificate. To prevent this practice, which naturally enough arose from the footing on which certificates had been placed, and which, in spite of every precaution, will never be prevented so long as that footing shall continue, it was enacted, by the statute the 24 Geo. II. c. 57, § 9. That if any person shall swear to a fictitious debt, and shall, in respect thereof, sign the Bankrupt's certificate, the certificate shall be void, and the Bankrupt shall not be discharged, nor shall he receive any allowance, unless he shall disclose the fraud, and object to the reality of such debt.

* Stat. 19 Geo. II. c. 32, § 2.

Such were the partial, and surely inadequate, provisions which the legislature thought fit to make, for the prevention of those evils to which the crude and ill-digested code of Bankruptcy had given rise. Sometimes severe, sometimes merciful, now vigilant, then remiss, ever inattentive to the great principles by which the conduct of legislators should be regulated, they preferred the timid policy of palliating occasional mischiefs, to the more daring line of reformation, to an inquiry into original principles, by which alone a perfect and lasting cure of this inveterate disorder can be effected. To what can we attribute this conduct, so pernicious to commerce and to credit? Reverence for our rulers forbids us to reply. Of this we are certain, that it was not owing to the silence of the people, or to any want of complaint or of importunity. Repeated applications, as we have seen, were not wanting; and, in the year 1759, another attempt was made, by the unhappy sufferers under these laws, to obtain redress, and to procure relief.

In that year a petition was presented to the House of Commons by a number of Bankrupts, on behalf of themselves and their fellow-sufferers. By this they alledged, That having been declared Bankrupts, and having strictly conformed to the Bankrupt-laws, by a surrender of their all upon oath, for the benefit of their creditors, they had nevertheless, through the misapprehension of some of their principal creditors, been refused their certificates; that, as the law stood, they had no probability of relief; that, in consequence of such refusal, several of the petitioners had been necessitated to abscond, while others had been thrown into prison; that they were under the particular hardship of an incapacity of receiving any benefit from an insolvent act; that they conceived, the power of refusing a certificate, which

was vested in creditors, was grounded on a presumption that such power would be tenderly and but seldom exercised, and then only in notorious cases; but that the great increase in the number of Bankrupts within the last two years, and the small proportion of those who had been able to obtain their certificates, had made it more than probable, that the power had been exercised for cruel and unjust purposes, and contrary to the meaning and intention of the legislature. They concluded, by representing their miserable situation, which was such that most of them, with their desolate families, must inevitably and speedily perish, unless timely relieved by the interposition of parliament: they therefore prayed, that the House would take their very compassionate case into consideration, and would grant them relief.

Very shortly afterwards, a Committee was appointed to consider of the laws relating to Bankrupts, and to report their opinion thereon to the House. To the consideration of this Committee the foregoing petition was referred.

On the second of June following the Committee made their report. This report, which is extremely voluminous, contains a number of instances of the cruelty and impolicy of the Bankrupt system. Of these we will not enter into a detail. To him, who wishes to expatiate on so melancholy a subject, the Journals of the House of Commons will afford an ample field. We are more particularly interested in the consideration of the other part of this report, which contains the examinations of several Commissioners of Bankrupt, for the purpose of investigating

Comm. Journals (Feb. 1759) Ibid. 22 Mar. 1759. Ibid. 1. Jan. 1759. X 3

the causes of the existing evils, and of receiving hints of amendment.

Mr. Capper mentioned the circumstance, of the Bankrupt escaping from the penal consequences of the statute the 5 George II. by an enlargement of the time of his surrendering. He was of opinion, that the business of joint and separate Commissions might be better regulated; and that the same might be done, at a less expence, under an act of parliament, which was done by an application to the Great Seal. He submitted, whether Bankrupts ought to have their certificates, unless they had been in trade twelve months at least, or unless they should divide twelve shillings in the pound.

Mr. Loft was of opinion, that the act of Bankruptcy should be confined to some small period of time anterior to the suing out of the Commission; that no Bankrupt should be at liberty to prefer any Creditor on the eve of a Bankruptcy; and that new Commissioners might act without the expence of a renewed Commission. He thought that no certificate should be allowed until after a dividend; that, in case a Bankrupt should be so circumstanced as to be unable to finish his examination on the forty-second day, a power should be vested in the Great Seal, or in the Commissioners, to enlarge the time. He also proposed, that, if the Bankrupt should not surrender until the last day, he should be compelled to surrender at ten o'clock in the forenoon; and that a Bankrupt in execution should be brought up for his examination on the Commissioner's warrant.

Mr. Green thought, that, if a Creditor should refuse to sign a certificate, he should be obliged to make his objection, within a certain time, before the Commissioners; who, if they should think the objection unreasonable, should have it in their power to over-rule it, and to grant the certificate. He was

of opinion, that certificates should be restored to the footing on which they had been left by the statute 4 & 5 Anne; and that the expence of obtaining certificates should be defrayed out of the estate, or from the Bankrupt's allowance. He mentioned as hardships, that the assignees should have it in their power to refrain from making a dividend, until compelled by the Great Seal; and that, before any certificate is granted, the effects were often divided, to prevent the Bankrupt from having the benefit of his allowance. For these hardships, however, he offered no remedy. He proposed, lastly, for the ease of a Bankrupt's bail, that, where a Bankrupt is detained in custody at the suit of a Creditor, he should be discharged by the Court, on producing the Commission, and proof of such Creditor having proved his debt.

Such were the proposals for a reformation of this Code, which were submitted to the Committee. Of these it will not be very hazardous to pronounce, that they were incompetent for the intended purpose. They went upon the idea, that the original principles, on which this system of laws was founded, were either just, or such as could not easily be improved. Whether this idea was well-founded, we have already had some occasion to see: in the subsequent part of this work, we shall treat more fully upon that subject. At present it may be sufficient to inform the reader, that, after all the pains which had been taken, and after all the evidence which had been laid before this Committee, the whole business ended in nothing. On the very day when this report was read, the parliament was prorogued, and the project of reforming the Code of Bankruptcy has never since been resumed.

One regulation has however been made, which does great honour to modern legislators, as it was a

voluntary dereliction of a privilege, and a manifestation of their sincere desire to put themselves on a level with their fellow-citizens, in a point where natural justice required that all men should be on an equality. By the statute the 4 Geo. III. c. 23, it was declared, That all members of parliament, within the description of the Bankrupt Acts, should no longer have it in their power to defeat the just demands of their creditors; but that such creditors as, under the former Bankrupt Acts, were competent to sue out a Commission, should be at liberty to sue out a summons, or an original bill and summons, against such privileged trader, and to serve him with a copy of it. If such trader should not, within two months after such personal service, and after an affidavit of the debt being filed, pay, secure, or compound for, such debt to the satisfaction of the creditor, or enter into a bond in a sufficient sum, and with two sufficient sureties, to pay such sum as should be recovered, with the costs, he shall be adjudged a Bankrupt from the time of the service of the summons; and any Creditor may sue out a Commission against him, and may proceed as against any other Bankrupt. And if any such privileged trader shall commit any ordinary act of Bankruptcy, he shall be liable to a Commission, and the Commissioners shall proceed against him as against any other Bankrupt, notwithstanding his privilege.

Thus have we deduced the history of the Bankrupt Code, from the earlier times of our constitution to the present. The reader will now be enabled to judge of its expediency, and to determine upon the propriety of those alterations, to the consideration of which we now proceed. Something, we may be assured, is defective in the principle of these laws, otherwise the effects they have produced could not have been so opposite to the intentions of the

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law-makers. They are severe; they encroach violently on the constitution and the rights of the subject: but they are ineffectual; they are despised by those whom they were intended to restrain; they are become the instruments of fraud. Better would it be for this country that no such Code existed, than that its operation should be so perverted. When the severity of an institution is directed by the hand of wisdom, the citizen may forget, in his private advantage, the aberration from the constitutional law; but, in proportion as sanguinary statutes are imperfect, or are impotent, they will be trampled upon; the institution, which was framed for the protection of virtue, will become the minister of iniquity, and the destruction of Credit and of Commerce.

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1. The first of these is the fact that the majority of the population of the United States is now living in the cities. This is a result of the industrial revolution, which has brought about a concentration of the population in the cities. The second of these is the fact that the majority of the population of the United States is now living in the cities. This is a result of the industrial revolution, which has brought about a concentration of the population in the cities. The third of these is the fact that the majority of the population of the United States is now living in the cities. This is a result of the industrial revolution, which has brought about a concentration of the population in the cities.

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P A R T III.

HAVING thus deduced the History of Insolvency in this country, through its several branches, from the period of remote antiquity to the present time, we now arrive at that last portion of our work, without which all that has already been written would prove no better than an idle and useless disquisition. To trace the legal policy of our forefathers through a succession of ages, to display the gradations from rectitude to error, or from cruelty to benevolence, may fulfill the purposes of the student, or may gratify the curiosity of the inquisitive reader. But when so much is at stake, when the interests of our country, when the cause of humanity, call aloud for some alteration in a system, allowed on all hands to be corrupt and erroneous, to stop here would be to defeat the real object of such an enquiry. It is not enough to know that we are wrong. The consciousness of error should awaken our minds to a
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review of the specific causes of our improper conduct, and to an investigation of those means, which may, most probably, enable us to extricate ourselves from our present difficulties. When we once know the extent of our deviation, when we are enabled to trace up our evils to their real causes, it becomes less difficult to form a new set of regulations, in which we shall, at least experience one advantage, from the certainty of avoiding those circumstances, the insufficiency or the impropriety of which we have had occasion already to condemn.

In all projects of reformation, three things are principally to be considered : the present Inconvenience ; the various Causes to which it may be attributed ; and the Methods which appear the best suited to effect a substantial and beneficial Change. This order we will pursue.

The present Inconvenience, under which this country labours from the existing system of Insolvency, is too obvious, even to the most incurious observer, to require much proof. It is one of those apparent facts which cannot be controverted. The daily consequences by which it is attended bring home the alarming truth to the breast of every man. In every order of life we meet with ruin, with misery, and with fraud. The honest Insolvent is permitted to be a victim, while the dishonest Bankrupt triumphs in his uncorrected villainy, and insults those laws which he glories in having evaded. Our gaols are filled with thousands of individuals, born to freedom, and endowed with qualifications which might be applied to the advantage of the community. Whether these wretches are objects of compassion, whether they are virtuous or not, the state equally suffers from their confinement. No citizen, merely civilly and not criminally bad, ought to be accounted an useless member of the state. Be his endowments
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either mental or bodily, he may be brought to contribute to the general good. But in a gaol, not only no distinction is made between the virtuous and the profligate, between the honest and the fraudulent, but all its inhabitants are indiscriminately confined, and precluded from discharging the first of all duties, that of an industrious and useful citizen. After what has already been said upon this subject, to enlarge upon it here were tautology.

Nor is the present system of Bankruptcy less liable to objection. We have seen that it took its rise from no settled principles. As new frauds presented themselves, as the existing laws were found insufficient, or as bad men became experienced to evade them, new statutes were made. The original defect however continued, and with it all its fatal, though inevitable consequences. The legislature in vain attempted to restrain abuses by partial and imperfect provisions; wherever they felt an immediate evil, they applied occasional remedy; they laboured to correct an effect, when they ought to have enquired into the cause. The consequence of this injudicious conduct has been such as might reasonably have been expected from it. The Bankrupt laws, instead of deterring the iniquitous, or of intailing a certain punishment upon their offences, have been converted into a means of protection, and are become an engine of villainy and deceit. Fraudulent and designing men found little difficulty in evading a loose definition; they cloathed their artifices in such a disguise, as to escape the hand of the law. By degrees, the attempts of a few having been successful, others were encouraged to follow and to refine upon their example. The contagion became general. Bankruptcy was found not seldom to be more profitable than upright dealing. The fair trader must run great risques, and can become rich but by slow degrees.

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By a well-concerted Bankruptcy, every possibility of hazard may be avoided, and a greater fortune may be acquired by one single stroke, than could, in the common course of business, have been accumulated after a life of honest industry. No sooner was this secret known, than fraudulent Bankruptcies grew up into a regular system. There are found men, to whom fraud and perjury are familiar, who dare to profess it as a science. By the interposition of these abandoned characters, any man may securely violate the faith of commerce and the laws of his country. He may engage in an extensive trade, he may rob his fellow citizens of their property: but the justice of the nation cannot reach him, surrounded with fabricated books and fictitious creditors. Secure of a majority both in number and in value, he may become in fact his own Assignee; he may appropriate to himself what proportion of his estate he pleases; he may insure a Certificate, and may again begin the world, cleared of all his debts, and affluent with the spoils of his honest and injured creditors.

Such are the outlines of the Inconveniences attendant upon the present system of Insolvency. Let us now enquire into the Causes, to which these enormities may probably be attributed.

The First of these which attracts our notice is of a very general nature. As it is in fact the foundation of all those evils we have mentioned, it behoves us in the first place to afford it our attention. The Cause to which we allude is the striking distinction made between Debtors Bankrupt and Not Bankrupt. This distinction, as we have seen, was first established in the year 1570, and has continued from that time uninterruptedly to the present. It arose from the anxious desire of the legislature to restrain fraud; and it was taken up as the most obvious experiment which presented itself, though it certainly was not the most eligible

eligible which might have been adopted. The experience of more than two centuries has doubtless been sufficient to ascertain its propriety. If it has been productive of advantage, let that advantage be produced; let us know how and where the community has been benefited by it. Has fraud been prevented? Has commerce been strengthened? Has credit, either public or private, been promoted? Has the number of Bankruptcies decreased? If these questions can be answered in the affirmative, then may we grant that such a distinction is judicious. But, if the general voice of the public, if the repeated declarations of parliament, if the daily experience of mankind, and if every new publication of a Gazette, demonstrate the contrary, our predilection in favour of an established system must not be permitted to pervert our reason. On evidence so strong and so conclusive, we might perhaps be warranted in resting the question. But there are other arguments in favour of our proposition, not less forcible, though less generally obvious. Two of these are extremely material, and require some share of investigation.

A Distinction of this nature is contradictory to the great principles of Reason and Natural Law. In every kind of traffic, in every transfer of property, except in the case of Gifts, there is a condition, either expressed or implied, for an adequate compensation. This condition takes place instantly, though its operation may be suspended, according to the agreement of the parties. The vendor or the lender acquires an immediate right to a return of goods or of money; the vendee or the borrower becomes subject to that claim, and is bound to discharge it. This being the case in all matters of contract, the mode of recovering property so due ought in all cases to be governed by the same principles. The essence of the contract arises from the nature of the property advanced, not from

from the situation of the borrower or of the lender. Whether a man be in trade or not, if he takes up goods or money, and neglects or refuses to pay for them, he is guilty of an offence; and, in the eye of reason and of justice, the offence is still the same, whether it is committed by a trader or by any other person. It therefore ought to be punished in the same manner, and the process in both cases ought to be the same. In all matters of a criminal nature, this rule is constantly observed. If a murder has been committed, or if a bank-note has been forged, no enquiry is ever made into the situation of the malefactor. The law looks no farther than to the crime itself; and the same process and the same punishment attend upon its commission. In all civil injuries a similar rule is observed. It is never asked, what is the situation of a trespasser, or to what order of men belongs the breaker of a close? It is enough that the defendant has acted illegally; the law takes its course, and the same justice is done to all mankind.

To go still farther.—What is the process of the Common Law in all cases of failure to discharge these very conditions? Any man, of whatsoever station, is at liberty to pursue his debtor for a breach of contract. No enquiry is ever made into the circumstances of either party. An action of debt or of covenant may be brought equally by a trader, as by any other man; and whether the defendant is a trader or not, he is equally liable to the jurisdiction of the court, and to the operation of the law. What then is the principle on which this process is grounded? Not any partial distinction of rank or situation, but solely the consideration, that a contract, which ought to have been performed, has been broken.

We see then that, in all other cases, the rule which we have laid down is religiously adhered to. Why it was departed from in this single instance, can be accounted

accounted for only upon the ground at which we have already hinted. Partial inconveniences having been experienced, the legislature applied a partial remedy. It appeared more easy to correct an immediate abuse, than to recur to that original principle, which, had it been properly enforced, would have prevented a renewal of the evil.

Imperfect as this method was, it has constantly been pursued by subsequent legislators. Conscious as they have all along been, that some radical defect must have existed, by which their unremitting efforts have perpetually been baffled, it is surprizing that they should still have gone on in the same manner, evermore repairing a tottering and inconvenient edifice, when, at half the expence and trouble, they might have built a new one, commodious and adapted to every purpose of general utility. To the reason already assigned for this impolitic conduct, we may perhaps add another: an idea that some peculiar care was essential to the protection of Commerce, and that, consequently, some peculiar code to regulate its ministers was also necessary. This is a doctrine generally advanced, and as generally received. So little do we feel inclined to subscribe to it, that, on the converse of this proposition, we presume to ground our second argument in disavowal of this partial distinction.

The Bankrupt Laws are evidently calculated to compel traders to be honest, and to discharge to their creditors those debts which they justly owe. Praiseworthy as this intention may be, it yet is certainly but half of that object, which should have engaged the attention of the legislature. Through the whole of these laws, Insolvents are considered as Criminals; the first process is an Execution of the highest nature, without a permission given to the object of it to hear or to object to the allegations on which it is founded.

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However well this may be calculated to prevent the frauds of traders after an insolvency, the regulations contained in this peculiar code hold out no protection to them against the dangers of that situation. The severity of these institutions may possibly prevent the misconduct of an Insolvent, after the Commissioners have declared him a Bankrupt. By doing this, they undoubtedly do a great deal; but they ought to do more, they ought to protect him from becoming a Bankrupt; they ought to enable him to carry on his business, and to steer clear of those shoals, on which so many honest and industrious traders have been wrecked. If a man is determined to be dishonest, the definitions and the threats of an act of parliament will not convert him. But if he is possessed of integrity, if he wishes to discharge his duty to his creditors, the law should assist his endeavours, and should support his resolution. Unless traders and their debtors are put upon an equal footing, unless the former can be empowered to compel the payment of debts due to them, as readily as their creditors can proceed against them, the scales will not be equally balanced. How can a trader, who is under a necessity of parting with his goods upon credit, carry on his business, or discharge his engagements with punctuality, unless some method shall be devised of affording him an opportunity of recovering their value, in some more certain, more expeditious, and less expensive way, than the ordinary judicial process affords? It is well known that an action at law is both tedious and expensive; a considerable time must elapse from its commencement to the consequent execution. But this interval may prove destructive to the Trader. He is all along compellable to answer the demands of his creditors; if he does not, a Commission of Bankruptcy will prove the inevitable attendant upon his incapacity. Such is the melancholy

melancholy situation of all those persons, who are at present exposed to the influence of the Bankrupt Laws. The operation of this system, thus injudiciously framed without an attention to the principles of justice, and from a wrong idea of the interests of commerce, has now taken a very unfortunate turn. Avowedly calculated to protect the fair dealer, and to coerce the fraudulent, it is become an instrument of oppression towards those whom it ought to befriend, and the means of extending, through every branch of commerce, the widest corruption and the most shameless deceit.

We would therefore submit it to the reader, whether this striking distinction between Debtors Bankrupt and Not Bankrupt is not one leading cause of the Insufficiency of the present system. There are however a variety of other causes, originating principally from this distinction, which have contributed greatly to produce those effects, of which the nation so loudly and so justly complains.

The first of these is the practice of Imprisonment for Debt. Attentively as we have already considered this subject, we will merely mention it here; with this further observation, that our daily experience may convince us, that debts are seldom paid by imprisonment. Our almost annual Insolvent Acts are alone a proof.

The second Cause, to which the Insufficiency of our present system is owing, is the Secret Method employed in the Opening a Commission of Bankruptcy. To prove this, it will first be necessary to shew what that Method is.

When the creditor of any trader is resolved to take out a Commission, he makes an Affidavit of his debt before a Master in Chancery, and enters into a Bond to the Great Seal, in the penalty of Two Hundred Pounds, conditioned to substantiate his debt, and to

prove the party Bankrupt. The Commission is then made out, is signed by the Chancellor, and is sealed. Three of the Commissioners to whom it is directed are summoned to attend at a Coffee-house, where they assemble in a private room, and where they are met by the Solicitor, the Messenger, the Petitioning Creditor, and the witnesses to the trading and to the act of Bankruptcy. Here the Commissioners receive an *ex parte* evidence, in an affair to which they were the moment before entire strangers. The Petitioning Creditor swears to his debt, and one or more witnesses swear to the other preliminaries. If their depositions are sufficient, the Declaration of the Commissioners, that they find the party Bankrupt, necessarily follows. This is succeeded by a Warrant directed to the Messenger, authorizing and commanding him to enter and break open the house of the Bankrupt, and any place where his property is, or may be suspected to be; to seize and detain all his ready money, furniture, goods, property, and books of account: and it is likewise followed by a Summons directed to the Bankrupt, requiring him to attend at Guildhall, on the three days appointed for his appearance.

To this method an obvious objection arises, from the secrecy and haste with which this important business is transacted. The Affidavit is made, the Bond is executed, and the Commission is sealed without the participation of any person, except of the necessary officers, the Petitioning Creditor, and the Solicitor. The whole of the subsequent process is equally mysterious. To the Bankrupt himself, of all others the most interested party, no notice is given; the first information he can receive is by the arrival of the Messenger and his attendants at his house. But is this agreeable to the constitution and to the laws of this country? Is a man to be tried, to be condemned, to be punished, without a know-
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ledge of the accusation brought against him, without a liberty of contesting the evidence of his accusers, and without an opportunity of being heard in his defence? If a common action of the most trifling nature is brought against a man, he has a right to a fair and open trial; he is intitled to cross-examine the witnesses of the Plaintiff, to produce his own, and to tell his own story. Why then is this common privilege to be denied to an Insolvent? It is no trifling matter to a trader, to have his house broken open, to have his effects seized, or to have his books and papers ransacked and perused. His fame, his fortune, the very existence of himself and of his family may depend upon it. Why then is he to be deprived of that right of knowing the accusation, and of disproving it if he is able, which is not, which cannot be refused to the most atrocious malefactor? Is Insolvency more criminal than Felony? Is it more horrible than Murder? Yet to the Felon and to the Murderer this inestimable privilege is not denied. Nor is it to be alledged in vindication of this practice, that, unless such secrecy is observed, the object of the Commission would oftentimes be frustrated. This argument might be carried, with equal justice, to very dangerous lengths. There is scarcely a mode of action known to our courts, in which the Plaintiff would not be pleased to have an execution as his first process; it would undoubtedly be very convenient, and would admirably answer the purposes of Oppression. But the voice of Law, the voice of Justice, proclaim the iniquity of such a proceeding. We can compare it to nothing so aptly as to the *Lettres de Cachet* used in France, which are issued privately, and where an imprisonment in the Bastile is the first notice which the miserable victim of tyranny receives of his prosecution.

There is another objection to this process, which ought to strike very forcibly the mercantile part of the nation. As the law now stands, it is in the power of any abandoned wretch, to blast the character and to ruin the fortune of the most established merchant, without incurring the hazard of detection, or the risque of punishment. If his conscience is sufficiently callous to disregard the criminality of perjury, there can be no obstacle to his suing out a Commission, either in his own or in an assumed name, against the first merchant on the Exchange of London. Neither the Secretary, the Chancellor, nor the Commissioners can discover the fraud; they are obliged to issue and to execute the Commission. What are the consequences of it? The unsuspecting victim of an abominable conspiracy may in an instant, in the full tide of fame and of prosperity, be turned out of his house; his effects, his books, and his most valuable writings may be seized. His name may be branded with the epithet of Bankrupt throughout Europe, and his reputation may receive a mortal wound. For all this he can have no other remedy, than a Petition to the Great Seal to supersede the Commission, or an Action at law to recover damages. But are these an adequate compensation? Let us suppose that such a Commission is taken out at the beginning of the Long Vacation, that a sufficient debt and a positive act of Bankruptcy are sworn against a Trader. The courts are then shut; they continue shut for three months. During this interval, his petition cannot be heard, his action cannot be tried. He remains without relief, without a vindication of his character; his effects are in the hands of his enemies, he continues subject to all the severe penalties of the Bankrupt Laws. That such things may be done, that they may be done without a possibility of punishing the offender, is but too certain. Those gentlemen,
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who are conversant with the Court of Chancery, can produce various instances. So far has this iniquity been carried, that even against persons unconnected with business, against private country gentlemen of unimpeached credit, and of perfect solvency, such Commissions have been issued and have been executed. It is no more difficult to swear that they are Traders, than it is to swear that a solvent Merchant has committed an act of Bankruptcy; and in both cases, it is equally impossible to disprove the charge, when the person accused knows not of the accusation.

The third Cause of this Insufficiency arises from the liberty now given to Creditors of chusing their own Assignees.

No two things can be more perfectly distinct from each other than Theory and Practice, particularly in those cases where the interests or the passions of mankind are concerned. It undoubtedly appears highly equitable, that those persons, for whose immediate sake the Commission issued, and to whom the estate of the Bankrupt is become liable, should have the liberty of selecting from themselves one or more persons, to recover and to manage it. Such was the idea of the law-makers, and such would probably be our idea, had not experience sufficiently shewn the dangerous evils which arise from it, and the very improper use which is but too often made of it by the designing and the fraudulent. Instead of answering that wholesome purpose for which it was intended, it is now become the most formidable engine for the purposes of villainy. The obvious advantages accruing to an artful Insolvent from the appointment of an Assignee, more desirous of consulting his interest than that of his creditors, is obvious. It was not long before it was discovered, that, by a dexterous management, such an appointment could be procured. The opportunities which it afforded, of

defeating all the purposes intended by the Bankrupt Laws, and of insuring to the Insolvent a large proportion of his unjustly acquired property, soon brought it into very general use. Repeated experiments have perfected the fraud; and the right of the Creditors to nominate the Assignees is become the foundation of the complicated and iniquitous system of fraudulent Bankruptcies.

As the intention of this part of our work is to evince the existence of the evils, consequent on the present mode of procedure, it will be proper, in order to prove the truth of this charge, to give a sketch of the plan frequently pursued by those, who, conscious of the advantages which may arise from a fraudulent Bankruptcy, prefer it to an upright dealing, and pursue it as their regular business. Objections may perhaps be made to a disclosure of this nature. It may be said, it is dangerous to point out modes of fraud: there are more who are inclined to copy a bad example, than there are who will draw an useful lesson from it: if it is generally known, that some artful men have pursued a particular path of deceit with success, others may be tempted to follow their example; the evil will therefore be increased, and the interests of the fair trader may be materially affected. Should such objections be made, and possibly they may be made by the very men whose practices we disclose, our answer must be, unless the real cause of the disorder is known, unless we are acquainted both with its origin and with its symptoms, we shall be unable to administer an effectual remedy. If, by disclosing the frauds of commerce, we may chance to put a weapon into the hands of the bad, we put, at the same time, a shield into the hands of the good, by which they may ward it off. Besides, as we shall hereafter presume to offer to the public an alteration in this, as well as in other parts

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of the present system, we shall at least be excusable for revealing the existing enormities, which are a disgrace to this country, and threaten to become the ruin of private credit. That page cannot be deemed hurtful to mankind, which, with the evil, points out the remedy ; which discovers the fatal workings of a deadly poison, and administers an antidote.

The following, then, is the general outline of a fraudulent profitable Bankruptcy.

To procure some degree of credit, is the first step taken. This is by no means a difficult thing, either in town or country. It is very easily effected by a confederacy, and almost as easily by a single person. There is, however, this difference : if a man engages alone in this pursuit, he must have some capital, however small, to begin with ; if several men undertake it together, they may effect their purpose without any original stock in hand.

In the latter case, the method is this. A. B. and C. having settled their plan, severally take houses, and assume the denomination of traders, at Norwich, Bristol, and London. In order to acquire a stock of goods, they separately apply to wholesale dealers for such commodities as they require, for which they tender in payment bills of exchange drawn upon each other at two, three, or four months after date. For instance—A. in London buys a quantity of mercery goods, for which he tenders such a bill, drawn upon B. at Norwich. The facility with which many traders receive such bills is well known. But supposing the wholesale dealer is scrupulous, and hesitates to take a bill drawn by one stranger on another : nothing can be more easy than to tender such a bill already accepted by B. and perhaps indorsed by one or two persons either real or imaginary. The unsuspicious dealer, dazzled by such an accumulation of security, and eager to dispose of his
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commodities, will then readily accept of the bill, and will deliver the goods. B. in the same manner draws his bill upon C. and C. upon A. Thus all the three obtain goods, and launch out into business. During the interval between the drawing of the bills, and the day on which they become payable, the three traders sell their different goods at an increased profit. By this they are enabled to discharge the securities, and, by such an instance of their punctuality, to obtain a new credit, and to enlarge the confidence of the wholesale dealers. After a time, they adopt a new plan. When such a bill of exchange drawn by A. upon B. becomes due, B. (who has then established the reputation of his solvency) instead of making a pecuniary payment, draws a fresh bill on C. who accepts it, and pays it at the appointed time. By this a great advantage is gained. The confederacy is enabled to traffic for six or eight months with goods which have cost it nothing: it may sell them, and make a repeated profit of the produce, before the day arrives, on which the prime cost is to be paid. By such means as these, it is obvious that enormous gains may be made. But there are others, which must wonderfully enlarge them. As the sphere of their business increases, the circulation of these bills increases with it. It may be extended to a very large circle, and may include a number of honest and unsuspecting traders. When this has once taken place, and that it may take place in a very few years our daily experience manifests, the object of the confederacy is arrived at its maturity. The utmost diligence is then used, their credit is stretched to its extent, to obtain money and goods upon the credit of these bills. As soon as they have gotten together as much as they can so procure, the bubble breaks, and the three traders successively become Bankrupts.

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Where a single man undertakes this business, he must of necessity have some capital, as he cannot draw bills. A very small one, however, is sufficient, to induce the generality of wholesale dealers to give him credit. The extravagant manner, in which many of these persons live, makes them desirous of getting rid of their goods at any rate. They prefer the chance of being delayed in the payment, to the certainty of keeping them a long time on their hands. It is surprizing to what an extent this is carried, and what excessive credit is often given to retail dealers, who are known to have inconsiderable capitals. In the year 1778, a haberdasher in Oxford street became a Bankrupt. It came out in evidence before the Commissioners, of whom the author of these pages was one, that he had been, before he became a haberdasher, a porter to a linen-draper, that he had married a young woman with about 300*l*. With this capital he set up in business, and, at the end of nine months, a Commission was taken out against him. During this interval, he had received goods from wholesale dealers to so great an amount, that, on the balance of the account, there was a charge against him of 2500*l*. 800*l*. of which had been advanced to him by one house. Extravagant as this ill-judged credit may appear, it is unfortunately much too common. The inevitable consequence of it is, that designing men will ever be ready to make an advantage of it, and to turn to the destruction of trade that credit which was calculated for its benefit.

When, by such methods as these, either a single man, or a confederacy, have amassed a large quantity of effects and of money, the next step is to fabricate a Bankruptcy. For this purpose, the assistance of an Attorney is absolutely necessary,

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That into the profession of the law some unworthy characters should have insinuated themselves, cannot be thought extraordinary. Where so many practitioners are admitted, all cannot be good. Indeed, where the temptations to be dishonest are so strong, it is rather to be wondered at that so many are honest. In the number of Attornies, there are many men of the most untainted principles and of the most unblemished honour; whose minds would revolt at the idea of acting in an improper, or in a clandestine manner. That there should be others of a different description, is to be lamented. But from these the danger to be apprehended is less than is usually imagined. The courts are ever watchful to check their misconduct, and their improper practices must soon be made known; when they are known, they may be avoided. In proportion, however, as they are avoided and despised by the virtuous, they become respectable, and of consequence, in the eyes of those, whose inclinations and pursuits are similar. An honest Attorney would disdain the emoluments arising from a scandalous prostitution of his name; recourse, therefore, must be had for such purposes to men of less confined principles and of more callous consciences.

When the assistance of such an Attorney is procured, the first process is to fabricate an ostensible set of Account Books, and to procure a sufficiency of Supposititious Creditors. Were any man, or any confederacy, to procure property to the amount of 5000*l.* by the means abovementioned, they would be indebted to an equal amount, and, upon a fair dividend, the creditors would receive twenty shillings in the pound, while the Bankrupt would have nothing more than his customary allowance. This would not answer the intended purpose. Some dexterity is therefore necessary to give such an appearance

ance to the business, as will best prevent a detection, and most certainly prove advantageous to the Bankrupt.

A new set of books is prepared, with every semblance of precision and regularity. Here all the bonâ-fide dealings are entered, and with them a number of ideal transactions with a variety of persons, on the balance of which, the future Bankrupt takes care to make himself debtor to the amount of 15000*l.* over and above the original 5000*l.* Part of these appear as book-debts; for part the trader gives bonds and promissory notes, or accepts bills of exchange. When this business is concluded, matters wear a very different face. The trader is in possession of 5000*l.* and appears to be indebted to the amount of 20,000*l.*

It is no more difficult to procure these fictitious creditors, than it is to discover a convenient attorney. If more than one are concerned, the confederates will serve for very considerable creditors. The remainder is easily supplied from that shoal of miscreants, who discharge the honourable employments of common bail, of affidavit men, of bailiff's followers, or of suborned witnesses.

Preliminaries being thus adjusted, the trader stays at home for a day or two, and orders himself to be denied to any creditor who may call upon him for money. In consequence of this, one of his fictitious creditors calls, and is refused admittance. An application is immediately made to the Great Seal, and a Commission issues.

At the first and second meeting, all the creditors, indifferently, prove their debts. It is easy to perceive, that the majority in value must be on the side of the fictitious creditors. This, of course, determines the choice, and an Assignment of the Bankrupt's property is regularly made, at the second sitting, to one or more of his friends.

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By this assignment, the condition of the bonâ-fide creditors becomes like that of the pigeons, who put themselves for safety under the protection of the hawk. The new assignees take possession of every thing, and have their choice of two methods in which they may act. They may disappear, and carry with them all the effects of the Bankrupt, to be divided afterwards at leisure, according to the terms of their agreement. This is sometimes done, though it may perhaps be too dangerous to warrant a frequent repetition. Or they may, at a due time, actually make a dividend of the whole 5000*l.* among the creditors. This, as the most eligible method, is the most frequently adopted. Upon this dividend, the creditors, whose aggregate demands amount to 20,000*l.* of course receive five shillings in the pound. But of these, only one-fourth has any real demand upon the estate. These creditors will therefore receive 1250*l.* and the remaining 3750*l.* will go to the others, or, in plainer words, to the Bankrupt himself.

Thus we see the facility, with which a man who set out with nothing can retire from a Bankruptcy with affluence. After this, can we be surprized at beholding a broken tradesman living with a princely magnificence, or at discovering that fraudulent Bankruptcies are become a regular and ordinary business? can we entertain a doubt of the impolicy of permitting Creditors to chuse their own Assignees, when a use is so readily made of it, replete with consequences the most injurious to honest traders, and the most destructive to the principles of commerce?

The fourth Cause of the Insufficiency of the present system owes its origin to the power delegated to the Creditors, of signing the Certificate of a Bankrupt.

This regulation arose from the same principle of equity, on which the last was founded. The legislature

gislature conceived, than none were so proper to judge of the good or ill behaviour of the Bankrupt, as the Creditors themselves, the persons, of all others, who were most interested in his integrity, and the most exposed to inconveniences from his misconduct. To four parts in five of them therefore, in number and value, this charge was intrusted. By their suffrages, the Bankrupt was to receive his allowance and his discharge, or was to be presumed unworthy of either.

Unfortunately, Certificates are become the reverse of what they were originally intended. The most honest are frequently unable to obtain them, and the dishonest are almost always certain of procuring them. This perversion of the legislative intention arises from a radical imperfection in the very nature of a Certificate.

The object of the Bankrupt laws is to procure to the Creditors the payment of their debts. On this principle, the whole proceedings should be regulated, and consequently the Certificate, the conclusion of them all, ought not to lose sight of it. But does the Certificate keep this object in view? No Bankrupt, says the statute of George II. shall be intitled to the benefits of this act, unless the Commissioners shall certify to the Chancellor, that he hath made a full discovery of his estate and effects, and hath in all things conformed himself to the directions of the act, and that there does not appear to them any reason to doubt of the truth of such discovery, or that it is not a full discovery of his property; and unless four parts in five in number and value of the creditors shall sign the certificate, and testify their consent thereto, and to the allowance and discharge of the Bankrupt. The Commissioners are prohibited from certifying, until proof shall be laid before them, by affidavit or affirmation in writing, of the Creditors
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having signed the certificate. The Certificate evidently confines itself to the Accidents of Bankruptcy, while the Substance is totally overlooked. A man may comply with all its injunctions; he may discover his estate and effects, he may conform to the several statutes, without paying a dividend of a penny in the pound, nay, without paying any dividend at all. Daily experience convinces us, that Certificates are frequently signed and allowed before a dividend. There have even been instances of Bankrupts having obtained their Certificates before a last examination.

Other bad consequences attend the present system. The obstinacy or the malevolence of a single Creditor frequently renders it impossible for an honest man to obtain a Certificate. Such instances are not uncommon. On the other hand, a fraudulent Bankrupt, such as we have described, finds no difficulty to procure one. It is in his own power to create the prescribed majority, and to render the prevention of it impossible to his bonâ-fide Creditors.

It is owing to this defect, that Bankruptcy is now become the common mode of extricating traders from the difficulties and embarrassments, which they may have brought upon themselves by their own improvidence or misconduct. When a man finds himself in ruinous circumstances, when he apprehends the consequences, which may result from his creditors becoming acquainted with his situation, he is naturally prompted to have recourse to that method, which will at once extricate him from all difficulties, and enable him again to begin the world, discharged of all those incumbrances by which he is weighed down. He, therefore, either fabricates a fraudulent Bankruptcy, by which he at once gratifies that desire, and enriches himself at the expence of his creditors; or, if he has too much principle suddenly to become a rogue, he satisfies himself, by prevailing

prevailing on some relation, or confidential friend, to take out a Commission against him.

That this will ever be the case, that the system of Bankruptcy will continue to be perverted, so long as Creditors shall be permitted to be the judges of a Certificate, and so long as Certificates shall operate as a general discharge of all preceding debts, cannot be doubted. The experience which we have already had must convince us that, while things remain on their present footing, no alteration is to be expected. Certificates, therefore, should be made to regard the real object of the Commission; the power of determining upon their expediency should be vested in other hands; and a distinction ought constantly to be made between those who become Bankrupts by unavoidable accidents and misfortunes, and those who bring Insolvency upon themselves by their own improvidence, profusion, or dishonesty.

The fifth Cause of the present Insufficiency arises from the Mode of conducting the business of Bankruptcies, and from the Persons who are delegated to conduct them.

Regularity is the soul of business. No court of justice, no public office, can subsist without it. In all of these, from the highest to the lowest, there are proper repositories for their proceedings, and certain officers are appointed for the purposes of preserving their records, and of managing matters which are peculiarly committed to them. Why this is not equally the case in Commissions of Bankruptcy, may be hard to say. But certain it is, in no affairs of any importance, is there so little precision, or so little attention to regularity or to decorum. There is indeed an office, in which the proceedings may be enrolled, at the conclusion of the business. This, however, goes but a little way to contradict our charge. From the issuing of the Commission until
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that conclusion, all the proceedings are kept by the Solicitor; the Commissioners meet at the stated periods, when these proceedings are indeed produced; but at other times they are thrown about the Solicitor's office, with very little of that respect which is due to evidences of so great importance. Nor, indeed, when these proceedings are produced at the sittings at Guildhall, is the conduct of many Commissioners by any means to be justified. Instead of permitting a Bankrupt to inspect them, as he has an undoubted right to do, several of these gentlemen have taken upon themselves absolutely to refuse him that privilege; assigning at the same time a reason, altogether as extraordinary as their prohibition, that they will not permit a Bankrupt so to procure evidence for a supercession of his commission. That the conduct of these gentlemen cannot be defended, is most evident. By the law of England, no freeman is to be disseised or to be ousted of his freehold, but by the verdict of his equals, or by the law of the land. This law abhors secrecy; it gives to every man an opportunity of exculpating himself, of disproving any charge which may be made against him. And this rule is general; it is equally applicable to Commissions of Bankruptcy, as to any other judicial proceedings. It is, if possible, more applicable to them, than to any others. In these, from the nature of the first meeting, the Bankrupt can have no information of the charges brought against him, or of the sufficiency of the evidence by which they are supported, but by an inspection of the Commission, and of the several depositions on which the Commissioners have declared him a Bankrupt. To these, therefore, he has a right to apply; he has a right to make use of them as a foundation of his application to supercede the Commission. It is surely an extraordinary doctrine, that in a case where

an execution of the highest nature is issued as the first process, the object of that execution should be refused a common privilege, which is never denied to a defendant in the most ordinary action.

From a desire of rendering the execution of these matters as commodious as possible to the merchants of London, all town Commissions are transacted at Guildhall. This is productive of great inconvenience. The apartments appropriated to this purpose are in general small; two or three different Lists are stationed at the same time in one of them, and, not unfrequently, each of these Lists has at the same time before it two or three Commissions in their different stages. When we consider the immense crowd which all this must necessarily occasion, and the noise, the heat, and the confusion which such a crowd must create, it will rather appear surprizing that the Commissioners should be able to breathe, than that they should hurry over an unpleasant business, and should be rejoiced to do it at any rate as expeditiously as possible. In such a chaos of papers and of clamour, how can a due attention be preserved? it may perhaps be said, that such an accumulation of business at one time is improper: the Commissioners ought to afford separate days to each Commission. Such an appointment would indeed greatly obviate the force of our objection; yet such an appointment cannot, as things now are circumstanced, reasonably be expected. The distance is so great, the attendance at Guildhall interferes so materially with the attendance upon the courts at Westminster, and with chamber practice, the fees of the Commissioners are so disproportionate to their labours, that this accumulation will never be prevented, so long as the system of Bankruptcy shall continue on its present footing.

Another material objection likewise arises from the above circumstances. Men of experience and of abilities are unwilling to take upon themselves an

employment, which must engage so much of their time, and which can produce to them so little in return. It is a very common thing for a Commissioner, when he gets into business on the circuit, or in Westminster Hall, to resign his commission, as a thing which he is no longer at leisure to execute. In other words, he retires from this business at the moment when he becomes a proper person to execute it. For, in transactions, on which depend the interests and the well-doing of the mercantile part of this country, no small share of ability, of knowledge, and of experience, is surely necessary.

Commissions which are executed in the country are still on a worse footing. Compared with these, the confusion and the imperfections of a Town Commission are absolute regularity and precision. It were unnecessary to enlarge on this topic, of which many and grievous complaints have frequently been made. One circumstance alone will be sufficient to impress on the mind of the reader, an adequate idea of the manner in which they probably must be conducted. A Country Attorney, when he takes out a Commission, inserts the names of his own Commissioners. If he is an honest man, his choice will probably be judicious and respectable. If he is not, or if he should happen to have any particular purpose to serve, it is not difficult to foresee what are the probable consequences of such a nomination.

The sixth Cause, which we produce in disavow of the existing system, arises from the enormous Expence attendant on the prosecution of a Commission of Bankruptcy. For this no settled rule is established. It, therefore, depends upon the conscience of the solicitor and of the messenger, subject, until the appointment of Assignees, to the supervision of the Commissioners; and afterwards to that of a Master in Chancery, without any regard to the amount of the effects to be

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divided. In consequence of this, no two bills are alike, and no two taxations can correspond. In general, the expences of a Commission, up to the second sitting, amount to between forty and fifty pounds. The subsequent expences are proportionably great. We believe that in very few Commissions the total charge is below 100 £.

The seventh Cause of Insufficiency is owing to that loose contexture of the several Bankrupt Acts, which has given encouragement to those practices against which we have thus born testimony.

We have seen that, by the existing law, a capital punishment cannot legally be inflicted on a Bankrupt. We have also seen, that it is in the power of any Bankrupt to release himself from the severity of all the denounced penalties, by procuring an enlargement of his time. There is another grievance, arising from the same cause, which demands a very serious attention.

There is nothing in the present Code to restrain a Bankrupt, who has not obtained his Certificate, from again embarking in trade, and from carrying on that trade to a very considerable extent. In consequence of this omission, instances of this nature are far from uncommon, replete as they are with mischief, injurious as they must prove to credit. It is true, indeed, that the evils hence arising cannot affect the Creditors under the Commission; whatever profits may be made by an uncertificated Bankrupt will belong to them, and will go to the increase of their dividend. But it should be remembered, that by such a distribution, equitable as it certainly is, all those persons, who may have given him credit from an ignorance of his situation, must be severe sufferers; and that their sufferings are doubly to be compassionated, as, in many cases, it is impossible to know that such a trader is an uncertificated Bank-

rupt. This inconvenience therefore calls loudly for some interposition, and for the application of a radical and effectual remedy.

Such are the Causes, to which the Insufficiency and the inconvenience of the present System of Insolvency may principally be attributed. When we consider the nature of these abuses, the rapid progress which they have made, and the fatal consequences of which they already have been, and of which they hereafter may be, productive to Credit and to Commerce, we must agree that some alteration is necessary, and that a new system is altogether essential to the existence and to the prosperity of those valuable interests. The various difficulties, which lie in the way of any one who hazards a proposal for such an alteration, and the bad success which hitherto has attended similar attempts, are sufficient to check the presumption of vanity, or the rashness of incurring the criticism of the public. One only motive can stimulate a writer, conscious of these difficulties, and diffident of himself, to submit to that Tribunal the result of his reflections and experience; the desire of doing good, of contributing his mite to the prosperity of his country, of discharging in some degree that duty which every man, and more especially every Englishman, owes to himself and to his fellow-citizens. Actuated by such motives, the Author of these pages presumes to suggest the following Plan of Alteration. As he has dared to expose the imperfections and the abuses of the existing system, he now compleats his design, by presenting to the Public what he conceives to be the outline of a competent and a constitutional improvement.

The only mode of producing an effectual reform, is the entire overthrow of that unjust and impolitic Distinction between Debtors Bankrupt and Not Bank-

rupt. By this step, we shall obtain a firm and effectual foundation, on which a new system, equally simple and beneficial, may be erected. The experience of centuries should convince us, that it is impossible to restrain abuses which spring from an established evil custom. If we are really desirous of doing good, we should resort to the fountain head; we should discover, whether the impurities of the stream arise from a radical defect, or whether an accidental confluence has introduced them. The cause being known, we shall be enabled with propriety to redress the consequences. It betrays no less a want of judgement, than it does a want of manly firmness, to tremble at the difficulties of such a research. Where truth, where the interests of our fellow-creatures are at stake, negligence becomes a crime. As well may a physician attempt the cure of an obstinate disease, from a superficial examination of some general symptoms, as a legislator may pretend to eradicate a civil disorder from the constitution, by a partial application to some of its most obvious effects. The endeavours of both will be fruitless, so long as the primary cause shall remain undiscovered.

Nothing can be more certain, because nothing can be more consonant to natural justice, than that the same means of redress, and of recovering property, should, in all similar cases, be open equally to all mankind. A citizen of the lowest order, who has lent his money or advanced his goods to another, is as much intitled to compel the payment of what is due to him, as a citizen of the highest rank can be. A trader, who doubtless is bound to satisfy his creditors, is no less intitled to receive a satisfaction from them; and has a right to employ the same methods, in the same case, against them, as they have against him. It is of no consequence, and

therefore it ought never to be made a consideration, what is the Situation either of the creditor or of the debtor. The Essence of the Contract is the only thing which should regulate the decision of the law-maker. All other partial Distinctions militate directly against the known and positive Rule of law, which considers the offence, and not the quality of the offender, which establishes certain boundaries, beyond which no one can advance with impunity, which denounces certain penalties, to which every one indifferently is liable. Either therefore this Rule is wrong, or our present Distinction must be erroneous.

It follows from this, that the Distinction between Debtors Bankrupt and Not Bankrupt is unfounded in principle. Experience likewise tells us, that it has been unsuccessful in practice. Frauds and abuses of every kind have flourished, in proportion as this distinction has been more positively marked. The various iniquities of traders, and the numberless subtleties which have been introduced to evade the Bankrupt laws, evince the futility and the impolicy of that Code. The multitudes of Debtors confined in our prisons, and the rapid increase of Insolvent Acts, must satisfy us of the insufficiency of the General System. In both, the principles of justice and of wisdom have been overlooked, and from both we daily feel the pernicious consequences of so fatal a neglect.

To restore credit to its proper footing, to remove those evils of which we so justly complain, it behoves us to have recourse to those principles, to which we hitherto have paid so little regard. On the Essence of the Contract, therefore, our system is to be founded. Let one justice be common to all mankind, and let the means of obtaining it be open equally to every citizen. As every man, of whatso-

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ever degree, or in whatsoever station, is bound in conscience and in equity to pay his debts, let a General Rule be established, by which every man shall be compellable to discharge that duty. Such a regulation must prove advantageous. We shall no longer lament that inequality which now prevails. Towards the same great object, one wide road will be opened to all. The same equality, which Nature and which Reason directed, will then become the Law of our country.

Nor can this be productive of hardship to any one. However the Great or the Powerful may object to a regulation, which will place them on a level with the rest of their fellow-citizens, the Candid and the Unprejudiced will applaud the institution. Let it be remembered by those who disapprove, that, before this distinction was introduced, one even course of justice was extended throughout the kingdom. And let them reflect, that it is in the power of any man to keep himself clear of every disagreeable consequence, which may arise from this regulation. To live with economy and with honesty, and to pay to every one that which is justly due, are the infallible means of avoiding them. It ought to be no less the pleasure and the pride, than it is the duty, of every man to observe this rule. If he does, he need not fear the terrors of a judicial inquiry; if he does not, whatever may be his rank or his situation in society, he merits that ignominy and that punishment which his improvidence, or his dishonesty, may bring upon him.

On the introduction of such a regulation, it necessarily must follow, that neither the general system of imprisoning a debtor, nor that peculiar mode of procedure chalked out by the Bankrupt-laws, can any longer subsist. Agreeably with our proposal, the process, as it always must originate from the
same

same principle, ought in all cases to be the same. And, indeed, the present process used in Westminster Hall, and that used by Commissioners of Bankrupt, co-existent and contradictory as they are, must appear, on reflection, to be no less absurd than they are detrimental to the public. They reduce us to a dilemma perhaps not easily answerable. The practice of imprisonment for debt is either legal, beneficial, and expedient; or it is not. If it is, it ought to be general; every man should have a power of imprisoning his debtor; no one should be privileged from arrest. If it is not, the practice should instantly be reprobated; the rights and the liberties of the subject should no longer be exposed to the rude attacks of illegal violence. Again;—the Bankrupt-laws either are or are not expedient. If they are not, so large a proportion of the people ought not to be exposed to so unwarrantable an encroachment. If they are, why are they not extended equally to all mankind? Why should one class of citizens be placed in a situation, so much more eligible than that in which all other ranks of men are placed?

These, then, are the Principles on which we propose to found our System. There should be no Distinction between Debtors Bankrupt and Not Bankrupt. No man should be liable to imprisonment for debt. Every Debtor, of whatsoever degree, if he shall owe to a certain amount, should be compellable to satisfy his creditors, in a manner more summary than that directed by the Common Law before the introduction of Commerce. If he shall neglect, within a prescribed time, to answer their just demands, he should be liable to a Commission of Insolvency. But it should not be in the power of any malicious creditor to harass him with a false demand. The same satisfactory and expeditious justice should be done to all mankind: the poor and the low
should

should be respected equally with the rich and the powerful. Encouragement should be given to the honest and the industrious, while the improvident should be checked, and the fraudulent should be restrained. The debtor should be compelled to pay; but ruin and desolation ought not to be the constant concomitants on unavoidable and pardonable insolvency.

These being the principles on which our alteration is to be founded, let us proceed to consider the Mode in which the business of Insolvency may be conducted. This is by putting it into the power of Creditors, under certain circumstances, to sue forth Commissions of Insolvency against their Debtors, whatever may be their rank or situation.

Important as this subject is, and open as it inevitably must be to the criticisms and objections of those who think differently, or who may be interested to prevent its success, it behoves us clearly and distinctly to point out every part of it. When an established system is to be overturned, each particular of that new one, which is to be erected in its place, ought maturely to be considered.

With this intent, we propose separately to treat,

I. Of the persons who shall be liable to these Commissions.

II. Of the persons who may be competent to sue out these Commissions.

III. Of the manner in which these Commissions are to issue.

IV. Of the manner in which these Commissions shall be conducted.

And herein we must treat,

1. Of the persons delegated to conduct them.
2. Of the method in which these Commissions are to be opened.

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3. Of the subsequent process.

V. Of the method in which Commissions are to be managed in the country, and of the persons to whom that management is to be intrusted.

I. The persons who shall be liable to these Commissions.

The Distinction between Debtors Bankrupt and Not Bankrupt being exploded, it necessarily follows, that one general rule should be laid down, by which every person, of whatsoever degree, should be compellable to discharge his just debts. As every man is under the absolute obligation, both of justice and of conscience, so to do; so should every man, on his neglect or refusal to comply with that duty, equally become subject to the legal process of his Creditors. Against every such Debtor, withholding from his Creditor that to which he is justly intitled, or failing to discharge those obligations, either actual or implied, which he has contracted, a Commission of Insolvency should be sued forth. It matters not, in the eye of reason, what may be the rank or the situation of the Debtor. The Great or the Powerful are not intitled to a larger share of the legislative attention, than the lower and more humble orders of society. The criminality in all cases is the same; the general interest is equally affected, whether the Insolvent belongs to an higher or to an inferior class. In all cases, therefore, the process ought to be the same. The Tradesman, who delivers his goods on credit to a Peer, should have an equal right to recover their value, as his own Creditors can have to compel him to pay to them their just demands. In a word, the original principles of Justice should be respected; immutable and eternal as they are, they should no longer be sacrificed, to indulge those fan-
ciful

ciful and ideal distinctions, calculated indeed to reward distinguished merit, yet too often prostituted to serve the illicit purposes of personal oppression or dishonesty.

A regulation of this nature will effectually put an end to those distinctions of Privilege, which were gradually introduced for the purpose of relieving particular bodies of individuals, from the cruel and illegal process of imprisonment. The cause of these distinctions will be removed; their effects therefore ought not to continue. Although it might be inconvenient, that Members of Parliament and various other persons should be imprisoned for debt, it never can be inconvenient that they should be compellable to discharge their debts. However it may interfere with the public service, that their persons should be liable to confinement, it can neither be inconvenient nor improper that they should be obliged to act with honesty and with conscience. A Legislator, so far from exulting in the privilege of defrauding his creditors, ought to glory in setting an example of integrity. Those persons, to whom their fellow-citizens have delegated the authority of making laws, and of protecting the constitution, instead of pluming themselves on such an exemption, should put themselves on a level with their constituents; they should even surpass them, they should become noble models of honour and of probity.

All those other Distinctions, with regard to Acts of Trading, introduced by the Bankrupt-laws, will also, by such a regulation, be extinguished. The infinite variety of Cases which have hence arisen, much as they have attracted the attention of Courts of Justice, have all proceeded on the same principle; namely, whether such and such specific dealings constitute trading. When, therefore, it shall no longer be necessary for a creditor to prove that his

debtor is a trader, such distinctions, oftentimes the fruits of sophism, sometimes of absurdity, must fall to the ground.

Generally, then, every one who is indebted to another, and who neglects or refuses to pay what he justly owes, shall be liable to a Commission of Insolvency. Certain modifications are however necessary, to prevent an improper application of this rule, and to render its operation universally beneficial.

The power of taking out a Commission should not be liable to be converted into an instrument of oppression. A due time should be allowed to a debtor to acquit himself of his obligations. No debtor therefore, on simple contracts, should be thus liable, unless the debt shall have been due for six months, and unless it shall be proved that a fair account has been delivered in to him, at least two months before an application to the Great Seal. Nor should any debtor on bond, or other security of the like nature, be deemed an Insolvent, unless he shall permit one month to elapse, after it shall become absolute, without duly discharging the debt.

By these provisions in favour of debtors, it must not be imagined that any hardship can betide their creditors. The course of the Common Law will still be open to them: they will still have the liberty of proceeding for the recovery of their demands; they may bring their actions, they may enter up their judgements, and may take out execution. We only contend, that the gates of mercy should not be shut upon the Unfortunate, upon those who still may have it in their power to redeem their credit, and to preserve their station in society.

There are however two cases, in which this indulgence should never be shewn. We mean the cases of Bills of Exchange, and of Promissory Notes.

Where

Where a man either has not ready money, where-
 with to make an immediate payment; or where he
 is obliged to answer the demands of his foreign cor-
 respondents (in which case the remission of gold and
 silver would be hazardous or impracticable), it has
 become the custom for him to make a Promissory
 Note, to draw a Bill of Exchange, or to accept one
 drawn upon him, for the amount of the sum in
 question. As soon as this transaction has taken place,
 he becomes absolutely bound to discharge his debt.
 The note or the bill becomes current cash, and, as
 such, is negotiable. On the exactitude with which
 these obligations are discharged, depends, in a great
 measure, the very existence of commerce. They are
 a new kind of coin, introduced by the common con-
 sent of negotiants, and supported, in favour of their
 utility, by the assistance of the legislature. In this
 light they ought constantly to be considered. The
 trader, who executes such a Note, or draws such a
 Bill, takes upon himself to send out a new sum of
 money into circulation, and to add it to that mass
 already sanctified by the faith of government. It
 behoves him therefore to observe the strictest punc-
 tuality in discharging such an engagement, and to
 return, by the most precise and honourable conduct,
 the compliment which the public has paid to his
 solvency and good faith. However lightly some men
 may consider the offence of failing to discharge a
 Promissory Note or a Bill of Exchange, it is un-
 doubtedly a crime of a very grievous nature against
 society. It is in its essence, and in its consequence,
 equivalent to that of adulterating the current coin of
 the kingdom. For where is the difference, whether a
 man fabricates and passes an hundred pieces of base
 metal, resembling guineas, or whether he issues a
 note to that amount, and fails to discharge it when
 due? Is not the individual, is not society, is not
 commerce

commerce in either case equally prejudiced? If so, ought not the punishment in both cases to be the same? Undoubtedly it ought. The voice of reason and of justice declares, that the only true method of ascertaining the proportion of crimes, is by an investigation of the injury which they do to society. But how is this proportion at present regarded? Of two offences, equally prejudicial to the public, the one is punished with death, the other passes with impunity.

It may perhaps be said, that coiners are punished capitally, because they insolently invade the prerogative of the King, who alone has the right of making and of issuing current money; and that those who issue non-effective notes and bills are exempted from a similar punishment, as their's is a merely private transaction, by which the Majesty and the Privileges of the Prince are not affected. This is surely a very insufficient argument, and arises from a misconception of the real essence of the crime. When the statute 25 Edw. III. was made, promissory notes and bills of exchange were unknown. Gold, silver, and copper constituted the general pledges of mutual intercourse. To preserve the purity of the coin, to prevent the abuses which would arise from a promiscuous permission of coining, and not from an idle idea of maintaining a fruitless prerogative, this law was passed. The legislature vested in the King that power, which the common interest declared unfit to be intrusted to individuals; and the penalty of death was annexed to the offence of coining, in order to prevent the evil consequence to society with which it inevitably would be attended. For the convenience of commerce, private persons are now permitted to fabricate bills and notes; in other words, they are allowed to coin money, not indeed of the same materials, but equivalent in value, and equally negotiable

able with the current coin. By this permission, a tacit compact is entered into between the legislature and the individual. "From the necessities of trade, you shall be permitted to throw a quantity of new specie into circulation. For the validity of this you shall be bound. If you shall fail to discharge the obligation when it becomes due, you shall be considered as a fraudulent fabricator of coin, intrinsically worth nothing, and which could have been valuable only from your solvency and punctuality. For this offence, for this injury done to society, you shall suffer punishment." Such is the true point of view in which this circumstance ought to be considered. If, in both cases, the injury done to society is the same, that, and that only should be our guide in pronouncing on the enormity of the offence, and in apportioning the punishment. Whatever legislature pursues a different path, and suffers itself to be dazzled with the splendour of a throne, and the idea of prerogative, will not be just: its laws will be defective in principle, and the community will suffer from their consequences.

From what has been said, let it not be concluded that we conceive the offence of failing to discharge bills and notes deserving of death. So far from it, we rather conceive that the crime of coining might as effectually be prevented without such a sanguinary penalty. There certainly ought to be a fixed proportion between crimes and punishments. To perform a given work, a certain force is necessary. All beyond this is superfluous and unnecessary. Where, to a civil offence, the same punishment is allotted, as is denounced against an infringement of the law of nature, we may constantly conclude that the legislature was either ignorant or interested. No wise man would apply the greatest force to an inferior purpose; he would not set an Hercules to cleanse

the stable of Augeas, or batter the mud walls of a cottage with a regular train of artillery.

But it is not our design in this place to propose a system of penal laws. We therefore return to our subject.

For the reasons above-mentioned, we conclude, that, in the cases of Promissory Notes and of Bills of Exchange, the same indulgence ought not to be shewn, to which the generality of debtors is intitled. Let it be declared, that all persons shall instantly become liable to Commissions of Insolvency, who do not, on the very day when they become due (after an allowance of the customary days of grace), discharge such Bills of Exchange, whether inland or foreign, as they have either drawn or accepted, or which have been returned and presented to them protested: or who do not, on the very day on which they shall become due, pay such Promissory Notes as they may have executed.

By these means, commerce will be strengthened, and the ill-consequences arising from the failure of this species of circulation will be, as much as possible, prevented. The designing and the fraudulent may possibly deprecate this provision; but it will be respected and applauded by all honest and honourable merchants.

The necessary consequence of these provisions will be the utter extinguishment of those specific Acts of Bankruptcy, which, at present, are the constant fore-runners of an adjudication by the Commissioners. Nor will this prove of small utility to credit. It will be attended with two certain and most essential advantages. As the non-payment of his just debts will subject every man, under the above limitations, to a Commission of Insolvency, the fair creditor will never be deprived of an opportunity of obtaining a speedy and satisfactory remedy. He will be relieved from those subtleties, which so often stand in his way, and prevent

prevent him from enjoying that relief, which it was clearly the intention of the legislature to afford to him. On the other hand, it will prevent the fraudulent Insolvent from fabricating a Commission; from making an improper use of those restrictions, which originally were calculated for the purposes of protecting the honest trader. The business of Insolvency will be brought to its proper point of view; we shall consider the substance of the offence, instead of perpetually fixing our attention on its accidents. It will no longer be disputed, whether a man resides in his house, or departs from it; whether he sees his creditors, or causes himself to be denied to them. The single circumstance, hereafter to be considered, will be, whether a man, who owes money, does or does not satisfy the just demand of his creditor.

II. The persons who may be competent to sue out these Commissions.

Although, generally, every debtor should be liable to this process, certain restrictions, as we have observed, must necessarily be introduced, to prevent it from being made an instrument of oppression. It ought not to be in the power of every inconsiderable creditor to harass him on whom he has a demand. To a certain amount, or under certain circumstances, a man may be indebted, with innocence, and without imputation: the nature of credit and of mutual intercourse requires such an indulgence. Beyond that amount, or under different circumstances, the case may materially alter. To contract a debt of Ten Pounds, and to fail in the payment of it, is undoubtedly wrong: but its consequences cannot be productive of essential injury to society. To contract a debt of One Hundred Pounds, and to refuse to pay it, is an injury of a much greater magnitude, in proportion as the one sum is greater than the other.

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Now, though it may possibly happen that a man may contract so many of these small debts, as to make the total amount considerable, yet the consequences of these collective charges cannot be so detrimental to society, as a single charge of the same amount. The burthen becomes more equally divided; and no separate part will be so heavy, as the whole would prove, were it laid upon one man. A Creditor for One Hundred Pounds may be permitted to sue forth a Commission, but it does not follow, that Ten Creditors for Ten Pounds should have the same privilege. For, as we have seen, although the man who owes ten such debts is an offender against society, yet each of his creditors receives but a tenth part of the consequent injury. And in this case, as the intention of the law is to benefit creditors, the specific damage accrued to them ought to be the rule, by which the proceedings should be regulated. If, therefore, a man shall be indebted to one creditor, in any sum less than One Hundred Pounds, it should not be in the power of that creditor to sue out a Commission against him. He may proceed, according to the course of law, by Summons, Attachment, and Distress; but the Debtor should not be punished by the loss of his liberty, or by the consequences of a Commission, for a single offence.

It may however happen, that, although a man may not owe the entire sum of One Hundred Pounds to any one creditor, he may be very considerably indebted, and may greatly injure those who have intrusted to him their money or their property. Such a man is undoubtedly included within the sphere of our system. Nor is this case to be confounded with that which we have mentioned above, of one indebted in several small sums, not amounting in the whole to more than One Hundred Pounds. Where a man owes considerably to many, if no creditor under One Hundred

Hundred Pounds should be permitted to proceed against his debtor, the fraudulent will readily lay hold of an opportunity so favourable to their wishes. Justice therefore requires, that some impediment should be thrown in their way. To effect this, although no single creditor under One Hundred Pounds shall be competent to take out a Commission, yet two Creditors, whose aggregate demands shall amount to One Hundred and Fifty Pounds, should have that power. The same liberty should be extended to three Creditors, whose joint debts shall arrive to Two Hundred Pounds; and to four Creditors, who, in the same manner, shall have a total claim upon the Insolvent to the amount of Two Hundred and Fifty Pounds.

III. How Commissions of Insolvency shall issue.

It is impossible to suggest a better method than that which is at present in use. That all Commissions should proceed from the Chancery, and that all Appeals from the determinations of the Commissioners should be brought before the same respectable tribunal, is an establishment of the truest wisdom. Far be it from us to object to those particulars, to which no objection reasonably can be made. We attack with freedom those parts of the present system, which impartial reason points out as exceptionable; we go farther, we dare to suggest our own ideas of alteration and improvement. But, as we narrowly scrutinize into its defects, we most readily add our tribute of applause to those parts of it, which are founded in wisdom, and are productive of general utility.

IV. In what manner Commissions of Insolvency shall be conducted.

We now enter upon a very large field, replete with objects which demand our most serious attention. Already has been exhibited the prospect of those in-

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conveniences, under which the community at present labours, of those evils, which threaten the existence of credit and of good faith between man and man. To apply a remedy for these evils, to remove these inconveniences, to suggest a new mode of determining the interests of creditors and of debtors, is the arduous task on which we now venture. As there is hardly any part of the existing system, which does not require correction, each part deserves a separate consideration. We will therefore pursue them methodically, and trace through all its branches the new doctrine of Commissions of Insolvency,

1st. The first object which should engage our attention must be the Persons delegated to conduct these Commissions.

There cannot be a more convincing proof of the insufficiency of the present establishment, than a comparison between the number of Commissioners of Bankrupt, and the very little business they do, or the very little advantage they produce. That this multitude of Commissioners is unnecessary, that the business would be done much more effectually by less than a seventh part of their number, may not be difficult to prove. In each of the three supreme Courts of Law there are only Four Judges; in the Chancery there are only Two. Yet what proportion can the business of Insolvency bear to the multifarious mass, which is agitated and determined before each of these Tribunals? To a single branch of the business of Insolvency, are however now appointed Sixty-five Judges. Whether any advantage has attended upon so numerous a delegation, is a matter to be determined by the public. A very contrary idea has, we are afraid, prevailed; and it has pretty generally been thought, that, although the number of Commissioners has gradually increased, the interests of
trade

trade have not been promoted, the iniquities of the fraudulent have not been restrained.

When the good of the public is at stake, it is our duty to be explicit in assigning what we conceive to be the immediate Causes of this Insufficiency. The writer, whose object is general utility, though he should disdain all personal reflections, should never fear to disclose the general truth. The deserving will not feel his censure; the opinion of the undeserving he should disregard.

This insufficiency then is clearly owing to two immediate causes; to the appointment of many persons, inadequate to the discharge of so important a business, and to the great difficulty, if not impossibility, of procuring others, more qualified. And both these causes are derived from a common source; the very inconsiderable profits annexed to the employment, and the great inconveniences which arise, from its necessary interference with other and more profitable professional business. Men of talents and of eminence will either not accept of so barren and so troublesome an employment, or, if they find it convenient to take a small place, rather than to have none at all, they will convert it into a sine cure, and prefer the receipt of 50*l.* a year without any trouble, to the receipt of 80*l.* obtained by numerous and vexatious attendances at Guildhall. In consequence of this, the majority of Commissioners does, and always must, consist of men neither of experience nor of knowledge. And to such men are committed the great and important interests of the credit and the commerce of this country.

By a very easy arrangement, all these difficulties may be obviated. It may be made worth the while of eminent and able men, to undertake the task of superintending the business of Insolvency; to give up other views, and to confine themselves to this one

important pursuit. Nor is this arrangement more simple in its nature, than it must certainly prove efficacious in its consequences. Various and convincing instances, of the possibility of dispatching a great deal of business with a very few hands, present themselves to our consideration, in all our legal Tribunals, in all the Departments of State, and in all the Offices relating to the Revenue. Let us then take them for our model; let us adapt the experience of others, to the production of that reformation, which can be substantially effected only by a similar institution.

Pursuing therefore such a course, we submit to the public consideration the propriety of abolishing the present phalanx of Commissioners, and of establishing in their place a regular Board of Insolvency.

Such a constitution will comprehend every thing, which is at present diffused through sixty-five Commissioners, and perhaps fifty times that number of other persons, mediately or immediately concerned in the conduct of Commissions of Bankruptcy. All of whom are to be fed from the estates of the Bankrupts, and who, consequently, all tend to diminish the dividend of the honest creditor.

The Board of Insolvency may consist of Nine Commissioners, of a Secretary, of a Solicitor, of three Assignees, of an Accountant, of a Comptroller, of a Cashier, of their several Clerks, and of a certain number of Messengers. With these few officers, the whole business may be done completely; for, it is proposed, that these officers shall be competent men, that they shall have no other engagements to call off their attention, and that a handsome and proportionable reward shall be the consequence of their abilities and good conduct.

Of the Commissioners there is no necessity that the whole should be Lawyers. Although, for the proper discharge

discharge of the business, a great degree of legal knowledge is absolutely essential, yet a knowledge of the interests and of the different modes of commerce is not less so. A Board therefore wholly composed of Merchants, or wholly of Lawyers, would prove inadequate : if composed of both, it probably will be as perfect as such a Tribunal can be made. These Lawyers should really deserve that denomination. They should possess a knowledge of the principles of their profession, which seldom falls to the lot of Students or of Attornies. Such persons, therefore, we would exclude ; we would even propose to confine the selection to Barristers of at least three years standing. At that period, it is to be presumed that some professional knowledge has been attained ; at least it may be concluded, that then some professional knowledge ought to have been attained. Of such Barristers there are many, possessed of real science, of great ability, and of tried integrity, whom fortune has not been pleased to favour with the countenance of a powerful attorney, with a lucky opportunity of manifesting their talents, or with an independence, wherewithal to retire from a profession, by which they hardly pick up a barren subsistence. Too late in life to enter on a new line, too high-spirited to descend to those paltry shifts to procure business, which, however common they may be, no gentleman can submit to, or, by a submission to which, he forfeits with the sentiments the character of a gentleman, they drag on an useless existence, comfortless and disregarded. Of Five such Barristers let the Chancellor have the nomination. There is no great danger of selecting improper persons ; professional estimates are seldom wrong. However accident may bring some men into business, and may exclude others, the character, the abilities, and the knowledge of every one is soon known in Westminster

ster Hall. Popularity and frequentation are equivocal signs of superior merit. There may be Kenyons, whose opinions are never asked; perhaps there are Murrays, whose eloquence has never charmed the listening ear.

Professional reputation should also be the criterion, by which the choice of the four Merchants, necessary to complete the number of Commissioners, should be regulated. Of this reputation, not the Chancellor, but their brother-merchants must be the most proper judges. To them, therefore, the choice should be committed, subject to the approbation or the rejection of the Chancellor. Let it be declared, that the merchants, subscribing to Lloyd's Coffee-House, shall have the right of naming four persons, of unimpeachable characters, and experienced in business. To those, whom this society, the most respectable perhaps in Europe, shall have selected, the interests of credit and of commerce may with safety be intrusted.

Thus will be constituted a Board, adapted to all the purposes of regulating Insolvency. By an happy union, the balance between Law and Trade will perpetually be maintained; nor shall we have occasion to lament that ignorance, or partiality to favourite notions, to which a Board of mere Lawyers, or of mere Traders, would necessarily be exposed.

That able and proper persons should be induced to accept of these employments, it will be necessary to declare, that their continuance in them shall not depend on the arbitrary will of any man. Under such a check, integrity cannot freely take its course. Like the Judges, the Commissioners of Insolvency should hold their offices "*quamdiu se bene gesserint*;" in other words, they should be elected for life, subject only to a removal, in consequence of their own misbehaviour.

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The Authority of these Commissioners will be twofold ; general and special.

By their General Authority, they will have a superintending and corrective power over all the subordinate departments of the office. No act will be valid without their concurrence. They will allow all accounts, they will overlook all dividends. All the other officers will so far be dependant on them, as to be subject to their censures, and to dismissal on their representation to the Great Seal.

Their Special Authority will be extended to various matters. They will have the sole power of declaring Insolvency ; of issuing process ; of directing a seizure of the effects, or a personal imprisonment of an Insolvent. They will have the exclusive right of determining all contested matters relative to debts and claims, and of granting Certificates.

The extent of both these species of authority will appear more clearly, when we proceed to discuss the other branches of this section. It will therefore be necessary at present only to add, that, in all these matters, the judgement of the Commissioners should be final, subject only to the future correction of the Chancellor, by the summary process of Petition. By this, a great expence, both of money and of time, will be saved ; particularly, as by the following provisions the number of these petitions will probably not be large.

Expensive and tedious Appeals ought, as little as possible, to be cultivated. Some expedient should be devised, by which contested matters may without them be brought to a termination. For this reason we propose, that out of these Nine Commissioners, Five should constitute a Quorum, who shall be competent to discharge the ordinary business of the Board. At the end of every month, the Senior Commissioner on duty shall retire, and the next in order shall succeed,

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ceed. By this method, each Commissioner will be engaged for five successive months. All points should be determinable by a majority, except in particular cases of superior intricacy, where either the Commissioners shall entertain a doubt, or where the parties shall conceive a proper cause to exist for an Appeal from their adjudication. This Ordinary Board shall meet on the Monday, Tuesday, Wednesday, and Thursday, in every week; subject to no interruptions from holidays, other than those which are regarded by other courts of justice.

All appeals ought to be made to the General Board, which should be held on the first Friday in every month. This must be a meeting of all the Commissioners, or, at least, of as many as can attend. Should the number present be unequal, the reserved points shall be determined by the majority; if equal, by the casting voice of the senior Commissioner. By these means, if the opinion of the general Board shall correspond with that previously given by the Commissioners in ordinary, the dispute will probably be settled. But if any doubts shall still remain, or if either party shall conceive that justice is not done, a further liberty should be allowed of appealing to the Chancellor, who, in the ultimate resort, shall terminate the affair. Thus, complete satisfaction will be given to all parties, at the least possible expence. To appeal to the general Board will cost nothing; to appeal thence to the Chancellor, by the summary method of petition, will cost but little. Indeed that little will frequently be saved; for few men will probably be so obstinate or so hardy, as to dispute the authority of nine capable and impartial persons.

The Secretary to the Commissioners must be an Attorney of character, well conversant in all the ordinary forms of business. As his department will be

very extensive, three or four subordinate clerks will be absolutely necessary. On him will devolve the duty of preparing all depositions of debts, and all examinations of witnesses, previously to the meeting of the Commissioners; which will greatly expedite business, and save time, much of which is at present unnecessarily taken up by those forms, which the Solicitors delay until the meeting at Guildhall. To him also will belong the care of recording all the proceedings; which, enormous and fatiguing as it may seem, may easily be performed, by the simple process of keeping a separate file for each commission, on which the proceedings, sanctified by the signatures of the Commissioners, may regularly be entered.

The Solicitor must also be an Attorney, equally conspicuous for his integrity and ability. To the perfection of our plan, such an officer will be indispensably essential. We shall not otherwise be able to remove one of the greatest nuisances, of which the present system gives us reason to complain. This is, the enormous expence consequent upon the suing forth and the prosecution of a Commission. It is surely unreasonable, and it is evidently detrimental to the creditors, that no distinction should be made, in these articles, between a Commission which will pay twenty shillings in the pound, and one which will not pay half a crown. Can it be proper, that the charges of obtaining justice should consume the very end and means proposed by it? yet certain it is, that, in all Commissions indifferently, the present total expences are seldom less than an hundred pounds. Nor do we want examples, of these expences having exceeded the effects recovered under the Commission.

We therefore propose, that the powers of suing forth Commissions shall be vested solely in the Solicitor. This, as we shall see hereafter, will very considerably

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siderably diminish the expence; and it will be attended with another certain advantage, by checking, if not greatly preventing, the illicit practice of fabricating fraudulent Commissions, for which, as we have seen, the intervention of a friendly Attorney is necessary.

Both these officers should be under the immediate control of the Commissioners; and, in case of gross misbehaviour, should be liable to dismission by their authority. In the Commissioners also, their nomination of course ought to be vested.

The Assignees.

Having already laid before the public some account of those formidable evils, which arise from the present practice of permitting creditors to chuse their own Assignees, it will readily be imagined, that a similar mode of appointment will not constitute a part of our system. In truth it will not. Convinced, both by reason and by experience, as we are, that such a species of nomination, however it may be disguised, or however guarded, cannot fail of being always replete with mischievous consequences, we venture to propose another method, equally simple and commodious, perhaps more wise and more advantageous to credit and to integrity.

Effectually to prevent fraud, every temptation, even, if it can be practicable, every probability of being fraudulent, should be removed. To secure the interests of creditors, the particular interests of the Assignees should absolutely depend upon a faithful discharge of their duty.

To effect these useful purposes, the choice of Assignees should be taken from the Creditors, and Three Perpetual Assignees should be appointed, for the management of the affairs of Insolvents. As the objects of their employment will be credit and matters of account, the persons selected for this business should be merchants of ability and of character.

They

They may be chosen in the same manner as the four Merchant Commissioners, and should be so far subject to the Commissioners, as to be liable to their censures, and to removal, on their representation to the Chancellor. By such an appointment, the possibility of a fraudulent insolvency will be done away. It will not be worth the while of any man to fabricate a Commission, when no advantage can be derived from it; when, on the contrary, his effects must fall into the hands of judicious and impartial trustees, whom he will be unable to deceive, and whom it will be impossible to corrupt.

To produce this perfect integrity, if any further caution should be deemed necessary towards men so eminently approved, it will be sufficient to make it the interest of the Assignees, both to secure as much as possible of the property of the Insolvent, and to make a large and a speedy dividend among the Creditors. But, as this rule will be equally applicable to all the officers of the Board, we shall postpone any further consideration of it, until we consider the manner in which these officers are to be paid for their trouble.

These Assignees must be independent of each other. Each must have his several office, and each his clerks. They should take the business in succession; each being in duty for a month at a time, and a fresh Assignee taking his turn at every general Board. By these means, each Assignee will have an interval of two months, during which, he will have leisure sufficient to regulate and to expedite that business, which came to his office during the preceding month.

By such an arrangement, the expence of all Assignments will be obviated. When it shall no longer be necessary to chuse special Assignees, the estate and effects

effects of the Insolvent may be declared to vest, immediately on the adjudication of the Commissioners, in that standing Assignee who is prepared to receive it. There will be no interval, as at present, between these two acts; consequently, there will be less opportunity of secreting or of carrying away effects: for, it must be allowed, there is a material difference between the possession of a Messenger, who acts by a delegated authority, and that of an Assignee, who is actually the owner of the effects.

To these Assignees, the same power, which is already conferred on the occasional Assignees by the present Bankrupt acts, should be given; subject to such diversities and alterations, as either necessity or expediency may devise. These we shall consider more attentively when we come to treat of the process consequent on the adjudication of the Commissioners.

As a further check upon the conduct of these Assignees, it should be provided, that they should never retain in their hands above the sum of 100/. The liberty of retaining money, and the necessary consequences of that liberty, speculation and stock-jobbing, should constantly be reprobated by him, who devises a new system of legislation. No reason, at least no good one, can be assigned, why a man should be permitted to play with money, which clearly is the property of others; but many reasons may be alledged to prove, that such a practice has rarely been attended with any other consequences, than fraud, iniquity, and ruin.

Whensoever, therefore, any of the Assignees shall have the sum of 100/. or upwards in his hands, arising from the produce of the estate or effects of any Insolvent, he shall immediately pay it over to the Accountant, whose receipt shall be his voucher.

This

This officer must be a person, thoroughly experienced in accounts, and master of all the forms of business and of book-keeping. There is no necessity that he should be either a Lawyer or a Merchant; though perhaps, a man of the latter description will be better calculated for the nature of the several requisite duties.

He shall keep a regular and separate account for each Commission, entered under its proper title. To prevent him from making an undue use of the money paid into his hands by the Assignees, he shall be prohibited from ever retaining above the sum of 1000*l*. Whenever his receipts shall amount to that sum, he shall immediately pay it over to the Cashier, who shall give him a receipt for the same.

The Cashier shall be a man corresponding with the description already given of the Accountant. From the very great trust to be reposed in him, he ought to possess a superior and unblemished character. Virtuous, however, and immaculate as he may be, too wide a confidence ought not to be reposed in him. The opportunity of being dishonest is a temptation, which the most tried integrity cannot always resist. There can be little doubt of a man's honesty, and there is little danger to be apprehended from trusting him, when we know it is not in his power to be a knave.

With this intent it should be declared, that, on a certain day in every week, the Cashier shall pay the monies then in his hands, over and above some specified sum for the necessary daily demands of the office, into the Bank, in the name, and to be placed to the account of the Commissioners of Insolvency. This money, the aggregate of all the sums received upon the several Commissions, must continue there, to be called out occasionally for the payment of dividends. But no payment should be made, nor

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should the Bank answer any draft, unless it shall be signed by five at least of the Commissioners.

Thus will these several officers mutually be checks on each other. The Assignees will be restrained by the Accountant, the Accountant by the Cashier, and the Cashier will immediately be responsible to the Commissioners. Still, however, it is obvious, that another officer is wanting. There should be some person, altogether unconnected with the receipt of money, and removed from every possibility of temptation, who should possess a superintending power over all these persons, and who may act as a kind of mediating being between them, the Commissioners and the Creditors.

This person should be Comptroller. To him the other officers, engaged in the department of receiving the monies arising from the estates of Insolvents, should, at stated periods, deliver in their accounts. His observations and strictures on these accounts, together with a correct abstract of each of them, should be delivered regularly at each of the General Boards, to the Commissioners, who, by these means, will have a full opportunity of determining upon the state of all the affairs depending before them, and the upon good or improper behaviour of their several officers.

2. Of the method in which these Commissions are to be opened.

Having already seen the inconveniencies which naturally arise from the present form of opening Commissions, we propose to suggest a new method, by which they may be avoided, and by which justice and the rights of mankind may be more respected.

To establish criminality, the single charge of an accuser is not sufficient. An upright judge, before

he proceeds to condemnation; consequently before he gives his sanction to punishment is bound to hear the vindication of the person accused. A wise legislature will take especial care, that this rule shall in no case be infringed.

Taking, therefore, this maxim as our guide, let us adopt a process conformable to it.

On the issuing of a Commission, instead of proceeding, as at present, on the *ex parte* evidence of an unknown and interested accuser, let the Commissioners instantly execute two warrants; the one directed to a Messenger, commanding him to go to the house or houses of the accused person, and there to continue until he shall be countermanded. During this "provisional" attendance, he shall seize upon nothing, but he shall be stationed there to prevent any of the property on the premises from being carried away. All that insolence of office, for which these subaltern retainers to the law are so notorious, ought, as much as possible, to be prevented. The possibility of innocence should never be forgotten. While there remains such a possibility, the appearance of insolence is unpardonable. The object of this preliminary step is prevention. The mildest exercise of an authority, in itself sufficiently distressful, should therefore anxiously be prescribed.

The other warrant should be directed to the party accused. It should contain an information of the Commission having been issued; of the name of the Petitioning Creditor; of the time appointed for proceeding upon it; and it should also injoin him to attend, for the purpose of hearing the charge, and of admitting or of disproving it.

Should it be proved to the Commissioners, that the party accused is incapable of obeying this summons, by the accidents of illness or of absence, they may, in the first case, depute any three of their number to attend him at his dwelling, if it shall be

within a prescribed distance, or they may receive his affidavit, if his residence is more remote. Should he be absent, at any place within the kingdom, they may allow him a convenient time for his appearance. Should he have secreted himself, or should he have departed from the kingdom, except upon the necessary services of his King or country, they may formally cite him to appear.

In any of these cases, if the party accused, upon such summons as the nature of his case may permit, shall neglect or refuse to obey, the charge against him shall be taken pro confesso, and the Commissioners shall proceed in the execution of the Commission.

Should he, on the other hand, appear, the Commissioners, in the presence of both parties, shall state the charge. The Petitioning Creditor shall be heard in support of it; he shall state his proofs, and shall produce his witnesses. The party accused shall then be heard in his turn. He shall have an equal liberty to tell his tale, and to adduce his evidence. On this fair and impartial discussion, the Commissioners shall make their determination.

If it shall happen, that the Petitioning Creditor shall prove unable to substantiate his charge, the person accused should have an immediate compensation for the attack so injuriously made upon him. The Commissioners shall execute a Superfedeas of the Commission, confirmable by the Chancellor on petition; and all further proceedings shall be stayed, until the event of that application can be known. Should the Superfedeas be confirmed, the Bond of the Petitioning Creditor shall be assigned to the innocent object of his malevolence, and he shall become liable to all the penalties of perjury.

During the interval between the examination before the Commissioners, and the allowance of the Super-

Superseas, it may perhaps be inconvenient to remove the Messenger stationed on the premises. In this, therefore, the Commissioners must be guided by circumstances; if the matter shall appear doubtful, he may be suffered to continue there; if the falsity, or the malice of the Petitioning Creditor shall be apparent, justice requires his immediate removal.

When the Commissioners shall be satisfied with the proofs adduced in support of the charge, they may immediately declare the Insolvency, and may execute the warrants of seizure of the personal property, and of entry on the real estates of the Insolvent to the Assignee on duty, who shall, without delay, cause them to be properly enforced. Neither the Insolvent nor his family should be turned out of their dwelling, nor should they be deprived of those reasonable means of support, which nature requires, and which humanity dictates. Criminality and fraud are never to be presumed. An Insolvent should not be treated with severity, until it shall be proved, that the badness of his intentions, and the iniquity of his conduct have rendered him unworthy of indulgence.

The declaration of Insolvency should immediately be followed by a public advertisement, inserted in the next Gazette, containing the adjudication of the Commissioners, and the several days appointed for the appearance of the Creditors, for the purposes of delivering in a state of their demands to the Secretary, and of proving them before the Board.

By these means, the interests of all the parties concerned will be attentively regarded. To the fair Creditor, a free opportunity of recovering his right is afforded; but from the honest and the solvent, the liberties of an English citizen are not taken away. The cautious nature of these regulations, may, per-

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haps, in some cases, disappoint the cupidity or the vengeance of a Creditor; they may even be suspected of affording an accidental opportunity of concealment. But they will, in all cases, be consonant to justice, they will, as nearly as our present customs and the necessity of the occasion can permit, pursue the spirit of our constitution, and preserve inviolate the rights of a free community.

3. Of the Subsequent Process.

By the term Subsequent Process, we mean to include every transaction, which can take place between the adjudication of the Commissioners and the termination of the Commission. To particularize each of these, will be to incohere too much on the attention of the reader. It will be sufficient for our purpose, to give a general sketch of the method which we propose; to confine ourselves as much as possible to those parts of it, which either differ from the present system, or which arise from principles not hitherto adopted.

In each Commission, three days should be appointed, and made known by an advertisement, for the appearance of the Insolvent; and for the proof of debts. The last of these may be on the 44th day after the publication of the Gazette, that it may always fall within the four days in each week, on which the ordinary Board will be held. On this day, the Insolvent shall make his final surrender. If he shall then, or at a convenient time before, be able satisfactorily to prove, that he is unable so to do on that day, the Commissioners shall have power to enlarge his time, for any period not exceeding forty-nine days.

Certain other days should also be appointed for the Creditors to come in, and to lay their several demands and vouchers before the Secretary, who will

will properly prepare them for the inspection and allowance of the Board. No Creditor, who shall fail thus to come in, shall be permitted to prove, nor shall the Commissioners receive any proofs or claims, which come through any other medium than that of their Secretary.

At all these times, the Insolvent shall be required to attend. He shall have liberty to inspect and to dispute all demands made against him. If he shall absent himself, the claims of the creditors, being liable to no apparent objection, shall be taken pro confesso.

On the 44th day, or on the 49th day of his enlarged time, the Insolvent shall be under the absolute necessity of appearing, to pass his last examination. Here several contingencies may happen. He may fail to appear; and his failure may arise from several causes. If it shall proceed from sickness, the deposition of his physician and apothecary must be required. If he shall be out of the kingdom, except for the service of his King and country, process of outlawry shall be issued against him, reversible on his return, and on his producing a justifiable cause of absence, accompanied with a complete submission, surrender and disclosure. If he shall be within the kingdom, and shall secrete himself, or shall neglect or refuse to appear, he shall be deemed a fraudulent Insolvent, and shall be subject to such punishment as we shall hereafter specify.

If, on his appearance, he shall fail to make a full and true disclosure of his property, and if he shall be accused, and shall be proved to have concealed or removed any part of it, to the amount of twenty pounds, the Commissioners may be empowered immediately to commit him to prison, where he shall continue until the next gaol delivery; when he shall be tried as a fraudulent Insolvent, and shall be

punished accordingly, unless he shall in the mean time duly submit himself, and wipe off the charge of criminality by a complete disclosure of his whole estate.

Having already taken some pains to prove, that the punishment of death ought never to be annexed to a civil offence, we shall not at present add any thing on that subject to what we already have advanced. The end of punishment, says Beccaria, is no other, than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impressions on the minds of others, with the least injury to the body of the criminal. To produce both these effects, it is not so necessary to render the punishment of a crime severe, as it is to render it certain. The severity of a punishment generally defeats its certainty. The humanity of a prosecutor will seldom permit him to enforce a law, which denounces a punishment disproportionate and cruel. Our present Insolvent Laws are sufficiently severe; but this severity has not diminished fraud, nor has it proved the means of supporting credit. The only effect, which we certainly know to have arisen from it, is the multiplication of deceit and perjury, to the perpetration of which Insolvents are daily driven, to conceal an original fraud, and to avoid the punishment denounced against it. Such must ever be the consequence of a needlessly severe, and of course uncertain, punishment. That a punishment may produce the effect required, says the same admirable writer in another part of his work, it is sufficient that the evil it occasions should exceed the good expected from the crime; including in the calculation the certainty of the punishment, and the privation of

of the expected advantage. By this rule, let the punishment of fraudulent Insolvency be regulated.

It is impossible, in this place, to specify the different degrees of criminality which may attend upon fraudulent Insolvency. They are as various as the several occasions which give them birth. Yet, by these degrees, should the proportion of punishment be measured. Of such circumstances, the Judges, on the conviction of the person accused, must have the privilege of determining; and to them must be left the task of ascertaining the quantity and the duration of the penalties denounced by the legislature.

Of the various modes of punishment there are two, which a wise Legislator will never annex to the guilt of fraudulent Insolvency. He will not condemn such an offender to Death, because his offence is merely civil: he will not make him liable to Confiscation, because he can have no property, whereupon that confiscation can operate. Against Banishment, and against Corporal Punishment, there are equally forcible objections. If it is true, that the proper end of punishment is to produce the strongest impression on the minds of others, and to prevent the offender from repeating his crime, both these modes are surely destructive of that end, and consequently must fail to produce the expected advantage. A Corporal Punishment is replete with severity to the suffering party; but the effects of it are instantaneous, and easily forgotten, even by those few whom accident may bring together as spectators of the execution. There is besides, in the people of this country, a species of false glory in suffering a temporary pain with courageous insolence, which captivates the multitude, and produces rather an admiration of the sufferer, than a due sense of the enormity of the crime which he has committed. By Banishment,

ment, that strong and lasting impression on the minds of others, which ought to constitute the essence of punishment, is effectually prevented. A criminal is no sooner conveyed into a foreign country, than two inevitable and impolitic consequences arise. The state is impoverished by the loss of a citizen, and the operation of his punishment, with regard to the public, is compleatly destroyed. He may wander an outcast and an exile; but those, whom he leaves behind him, will derive but little advantage from an example which they cannot see, and upon which they will seldom reflect.

*Segnius irritant animos demissa per aurem,
Quam quæ sunt oculis subjecta fidelibus.*

The proper species of punishment for this offence should therefore be such, as will operate with effect, but not with cruelty or inconsistency, on the offender himself, and will prove a seasonable warning and a durable example to others, by which they may perpetually be reminded of the dangers consequent on an aberration from virtue, and on a breach of the laws. Three species of punishment may therefore be directed against fraudulent Insolvents; Imprisonment, Infamy, and Servitude: and these three should be inflicted, either separately or all together, at the discretion of the Judge, in proportion to the degree of the offence.

Imprisonment, rightly understood and properly directed, may undoubtedly be productive of much advantage to the sufferer, and of considerable benefit to the community. But, to effect this, it must be conducted otherwise than it is at present. It is not sufficient to inclose a man within the walls of a gaol, to introduce him to the society of the most worthless and abandoned associates, to put him on a level with them, to expose him to the contagion of their example,

example, and to the participation of their debauchery. By such a conduct, we do but encourage that vice which we wish to correct; we compel the miserable wretch to swallow the dregs of that fatal cup, which he had perhaps but begun to taste; we nourish and mature those evil habits, which a different process might have eradicated; we shut upon the hapless victim of an ill-judging policy the gates of repentance and of reformation. Nor can this species of punishment, so managed, be productive of greater advantage to the society in general. What influence can such an object have on the minds of the multitude? The sight of an hardened criminal, permitted to revel in the enjoyment of sensual gratifications, and mocking that legal authority so impotently exerted against him, must prove a dangerous example, and will rather tempt them to imitate than to abhor. The inside of our prisons is not the school of virtue. Many have entered them with innocence; few have quitted them without contamination.

Solitude is the only means of rendering imprisonment advantageous. Shut out from society, abstracted from those communications from which he has been accustomed to derive delight, the offender necessarily must turn his eyes upon himself. The prospect he there will find cannot be agreeable. The consciousness of guilt, and the reflections on an ill-spent life, can prove but an unpalatable repast. Yet this consciousness and these reflections may become the foundation of repentance and amendment. When a man's mind is no longer distracted with the allurements of the world, when he is at leisure to think, he will unavoidably make a comparison between himself and others, between their situation and his own. He will be led to account for so palpable a distinction; a distinction so little flattering to himself. He will deduce his own punishment from his offences;

offences; he will trace up his offences to the causes whence they sprang: he will estimate the consequences of virtue and of vice; he will weigh the advantages of the one, and the inconveniences of the other. From such an exercise, what beneficial fruits may not be expected? He, who was precluded from society, as unworthy to partake of its blessings, may become an useful citizen; the future productions of that mind, which had been contaminated by example, rather than corrupted by determined vice, may prove of material benefit to the society, which had the wisdom to temper punishment with clemency, to convert severity into the means of reformation.

This seclusion from society, this privation of the enjoyments which to many are the only end of existence, should be employed in cases of lesser guilt, arising from the want of consideration, the carelessness or the negligence of the Insolvent. Its duration should be proportioned to the degree of the offence, and to the obduracy or the penitence of the offender. In cases of greater and more complicated guilt, where, to a passive misconduct, are added the aggravating circumstances of premeditated fraud, the punishment of Infamy or of Servitude may be employed.

When a man has broken through that good faith which is the only cement of society, when he has adopted the sentiments and pursued the paths of fraud, he deserves that contempt and detestation, which a virtuous public should not withhold from him, if they wish to deter others from following so dangerous an example. In such cases, Infamy is the merited punishment. Of this there are various degrees, to be adapted by the wisdom of the Judge, according to the criminality of the offender. They extend from a simple reprehension, to the pillory, and

and to incapacitation; from the stigma, which a future good behaviour may efface, to that public and perpetual Infamy, which casts down the offender from his rank in society, takes from him the confidence of his fellow-citizens, and excludes him from that fraternity, of which he is no longer deserving to be accounted a member.

Servitude is also a proper punishment for a fraudulent Insolvent. It is highly just, that he, who has injured society by his misconduct, should repair that injury by his labour. We do not however mean such a servitude as that of the galleys in France and Italy, or that of the hulks under the direction of Mr. Campbell. For the latter, indeed, but little apology can be made. Human ingenuity could hardly have devised a more improper method, or one more certainly subversive of the end proposed. It is precisely contradictory to that rule which we have adopted as our guide; being cruel in the extreme to the sufferers, and productive of no advantage by the example it affords to society. The general error of all the plans hitherto adopted seems to arise from the idea of secluding those persons, from the commerce of their fellow-citizens, who have been adjudged deserving of this punishment. This prevails not only in the instances abovementioned, but in the *rasp-huyfes* in Holland, and in the Penitentiary-houses now building in England. Let us consider how far this practice is productive of, or contrary to, either of the ends which a wise Legislature should propose by punishments.

With regard to the offender himself—Servitude rarely is, and never ought to be, perpetual. No civil offence can be so atrocious as to require the expiation of a whole life. We should therefore divide this species of punishment into two portions; the one, including its actual continuance; the other

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commencing at the moment when the sufferer returns into society. During the former, the offender is, by the present practice, secluded from his fellow-citizens. But with whom is he associated? With what companions is he condemned to pass this period of horror? With wretches lost to virtue, with minds depraved, corrupted, and abandoned; under the dominion of tyrants, selected from the dregs of mankind for their eminent worthlessness. What must be the consequences of such a scene, to a mind already drawn aside from virtue, though perhaps not irrecoverably entangled in the labyrinth of vice? Surely this is not the means of preventing a criminal from doing further injury to society. Our daily experience proves that it is not. In proportion as offenders have been secluded from the community, and have been confined together in their noisome and contagious hulk, offences have increased, with a tenfold degree of atrocity. Mature in vice, sublimed to the height of depravity, the man, who went in a rogue, comes out a villain.

It will not require much labour to prove, that the community can derive little benefit from such examples. There is indeed one reason, which renders such a consequence perfectly impossible. The criminals are removed from the haunts of men; they are stationed at a distance from town, either in a hulk lying in the middle of a broad river, or within the high and impervious walls of a penitentiary house. We hear, it is true, that they are there; we may chance to see them, if accident or curiosity should lead us to visit them: but that constant impression, which alone can operate on the minds of the multitude, is removed: we want that living lesson, which is so necessary to keep alive the sense of virtue, and to restrain mankind, by the perpetual sight of its fatal

fatal consequences; from suffering themselves to be led away by the allurements of vice.

Hence it follows, that the only species of Servitude, which can be generally beneficial, must be that, which, to the prevention and amendment of the offender, adds a constant and forcible example to the public. Fraudulent Insolvents may be employed in many useful works: they may be sent on board the Fleet, to occupy the lowest offices, which are unworthy of the sailors; they may be placed in various troublesome and dangerous Manufactures, or in the meanest and most laborious departments of those which are more salutary; and, in all these, they should be distinguished by some peculiar badge, or form of dress, which will sufficiently point them out, and make their punishment conspicuous*.

In the infliction of all these punishments, natural justice requires that no distinction should be made, by the rank or the situation of the criminal. If we act thus, we shall conform to the voice of Truth, and obey those precepts which, from the beginning of things, she imprinted on the heart of man. If we act otherwise, if we deem that excusable in him of a higher station, possessed of greater lights and enriched with greater knowledge, which we deem unpardonable in the man of low degree, to whom such advantages were never communicated, we voluntarily embrace error, and give a sanction to iniquity.

A process of a similar nature should also be provided, to prevent concealments of the Insolvent's property by others, and to compel them to discover and to bring in to the Assignees such parts of it as

* The subjects of Imprisonment and of Servitude have been fully discussed by Mr. Hanway and Mr. Bentham. To the ingenious performances of these two Gentlemen we refer the reader.

they

they may possess, or as may have been committed to their custody by the owner.

We have already seen, that, immediately upon the adjudication, the whole property of the Bankrupt will vest in the Assignees. These shall proceed without delay to get it in. For effecting this, some length of time will generally be necessary. But, according to the nature of the property to be recovered, the time of making a Dividend should be regulated. Thus, it may be proper to declare, that, at the expiration of six months a first dividend of the Personal Estate shall be made; another at the end of twelve months; and a third, or final dividend, at the end of a year and an half. These dividends ought previously to be settled by the Commissioners, who must direct advertisements to be published in the Gazette, containing the day appointed for the payment, and the quantum of the dividend. Previously however to such publication, two Deductions must be made from the principal sum recovered, for certain purposes of which we shall hereafter take notice.

The Personal Estate should, in the first place, be applied to discharge the debts of the Insolvent. The whole of it, or such proportion as may be sufficient to satisfy those demands, should immediately be reduced to money. If it shall prove insufficient, the Real Estate should come in aid. But here a distinction may be made, according to the circumstances of the case. If the remaining debts of the Insolvent, after the application of the personal estate, do not exceed a certain proportion, a third for instance, of the marketable value of the real estate, that estate ought not to be sold. Some attention should be shewn to the Debtor, as well as to the Creditor; and a difference ought to be made, as in fact they are different in their natures, between a property of a variable

variable and uncertain quality, and a property which has long been in the possession of an antient family. In such cases, it may be proper that the debt should be discharged by instalments. The Assignees may receive the rents, and the Commissioners may annually direct them to be divided, subject however to the same deductions as the personal estate.

On the subject of these distinctions we do not wish to be very diffuse. Should any part of this plan be deemed deserving of serious attention, such matters may easily be modified.

We have mentioned, that two Deductions should be made from all monies recovered by the Assignees, whether from the personal or from the real estate, previously to a dividend. One of these should be applied towards the support of the Insolvent; the other towards the payment of the several officers, employed in discharging the business of the Commission.

With regard to the first, a considerable difficulty will arise, in distinguishing between those Insolvents who do or do not deserve indulgence. The only method of determining such questions must be by an investigation of each particular case. A general rule may however be adopted, with regard to those either absolutely good or absolutely bad. The latter will deserve nothing; but their innocent families will be objects of compassion. The former may be intitled to some allowance; and that allowance ought to be proportioned to the amount of the sum recovered by the Assignee. A difference should also be made between those Insolvents who have families, and those who have none. An allowance of 3 per cent. may be sufficient for the latter; an allowance of 5 per cent. may not be too much for the former.

The second deduction, as the object of it is intirely novel, will deserve greater consideration. As some

of the principal evils of the present system arise from the Expence consequent upon Commissions of Bankruptcy, and from the great delays and uncertainties in making dividends, by both of which the interests of the Creditors are materially affected; the means of avoiding these evils, and of introducing frugality and precision, must undoubtedly be very acceptable to all parties. It fortunately happens, that these means are no less practicable than they are obvious. If it once can be made the interest of those appointed to conduct these Commissions, to divide as largely and as expeditiously as the circumstances of the estate will admit, no farther difficulties can remain. And this is easily effected, by postponing their emoluments until after such a dividend, and by proportioning them to the amount of the sum divided. Let us suppose that sum to be 100*l*. From this 5 per cent. should be deducted, to be distributed in adequate shares among the several officers. Now, though the 5 per cent. upon 100*l*. is not a great sum, yet a similar deduction from all the money received by the Assignees will be very considerable. It will be amply sufficient to defray all the charges of the office, and to recompence the labours of those employed in transacting the business. It will be attended also with another very material advantage, as it will affect but little those Commissions, where the property recovered is inconsiderable, and where consequently the dividend must be small. We shall no longer have occasion to lament the insufficiency of an estate, to pay the expences of the Commission. Nor will the Commissioners and the other officers have reason to complain. They must take their chance. Their trouble in all will be nearly the same; and if a poor Commission makes them but a bad recompence, their profits will be proportionably large on the division of an ample property.

Having

Having already commented on the bad consequences arising from the present method of granting Certificates, we shall now merely suggest that idea, which strikes us as the most effectual means of putting them on the footing, prescribed by reason and warranted by justice.

The power of granting Certificates should be vested solely in the Commissioners. They alone can be competent and impartial Judges of the expediency of releasing an Insolvent from all former engagements. It will not be in the power of any man, however profligate or artful, to impose upon them. The fabrication of fictitious creditors will become nugatory: for a plurality of voices will then have no operation. The Certificate will be grounded on stubborn facts, which it will not be in the power of any Insolvent to disguise, and which he will be enabled to encounter only by a superior degree of honesty and of application.

It ought to be laid down as a General Rule, that no Certificate shall be granted, until the whole of the debts shall be discharged. By no other means can the real object of the Commission be obtained; the essence of which is, the payment to the Creditors of the debts justly due to them from the Insolvent.

To this General Rule there must, however, be some exceptions. Natural Justice requires that a distinction should be made, between those who are driven to Insolvency by unavoidable accidents or misfortunes, and those who bring it upon themselves, by their own want of prudence, of frugality, or of honesty. Against the latter, the General Rule should constantly be enforced: to the former, indulgence may be shewn, modified and proportioned by the particular circumstances of their case, and regulated by the opinion of the Commissioners.

Until the allowance of his Certificate, the Insolvent should suffer particular disabilities, and should, in many respects, be suspended from the enjoyment of those rights, to which, as a free citizen of this country, he previously was intitled. All such property, whether real or personal, as shall descend or come to him in any way whatsoever; all the profits of his labour; all casual advantages; any fortune which he may acquire by marriage, by legacies, or by any other means, should be subject to the Commission. He should not be able to make any settlements upon a wife, or to give portions to any children, otherwise than subject to the Commission.

An uncertificated Insolvent should be obliged to attend the Commissioners or Assignees, whenever they shall think proper to summon him; and he should also be obliged, twice in every year, at stated times, to attend at the office, for the purpose of giving in a true account of what he may have received as above, during the preceding six months. This account should be delivered in on oath. If any article therein shall be disputed, it shall be referred to the next General Board; when the Accuser, with his witnesses, shall be heard in support of the charge, and also the Insolvent in his own defence. If the charge shall be substantiated, and if it shall appear to the Commissioners to be of a nature sufficiently serious to warrant farther attention, the Insolvent should be committed to prison, to be tried at the next gaol-delivery as a fraudulent Insolvent, and to be punished accordingly.

If, upon the third dividend, it shall be found, that the whole property of the Insolvent is insufficient to pay Five Shillings in the pound to his Creditors, on the Capital of their debts, he ought immediately to be declared infamous, in such degree as the particular circumstances of his case may warrant. This stigma should

should not be wiped off, until Ten Shillings in the pound shall be paid. But the Insolvent ought always to be permitted to account for this deficiency, and to prove, if he shall be able, that it arose, not from negligence or dishonesty, but from some unavoidable accident or misfortune. In this case, however, the issue must always lie on him; and his evidence should be very complete and satisfactory, to overturn the positive fact of deficiency.

Until the allowance of his Certificate, an Insolvent should be deemed to have no credit. Whoever shall trust him, either with money or with goods, must do it at his own peril: for he should not be permitted to prove his debt under the Commission, or to sustain an action at law for it; but it ought to be presumed, that he received a due equivalent, when he lent his money or advanced his goods.

From these provisions, one certain and most beneficial alteration may be expected. It will not be the object of an Insolvent, as it is now the object of a Bankrupt, to obtain his Certificate, and thereby to procure a receipt in full of all the existing demands of his Creditors; it will not be worth his while to fabricate a Commission, for the purpose of accomplishing such an end; it will no longer be in the power of an uncertificated Insolvent to embark in trade, or to contract new debts. By the adoption of these regulations, the payment of what he owes will be made the only matter of real consequence to the Insolvent. Until he shall do this, he will live in a great degree the outcast of society; when he shall have done it, then, and only then, will he be restored to the credit and to the privileges of a Citizen.

V. Of the method in which these Commissions are to be managed in the Country, and of the Persons to whom that management is to be intrusted.

So very defective is the present system with regard to Country Commissions, and so replete is it with every seed of irregularity and of fraud, that it cannot be very hazardous to propose some alteration; perhaps it may be far from difficult to suggest one, in every way preferable to that of which we complain.

As in several departments of the Revenue, there is a regular subordination of officers, who transact the business committed to their charge in the different parts of the kingdom, subject to the controul of their superiors; so, for the management of Country Commissions, a system of the same sort may very properly be adopted. There may be, in each County, a peculiar Board, composed of more or of fewer Commissioners, in proportion to its size; of one or more Assignees, and of those other officers whom we have already described; all dependant upon the Superior Board, and answerable to it for their conduct. It may be deserving of consideration, whether the Receiver General of the County would not be the properest person for the Cashier.

For the due management of these Country Commissions, another officer will be extremely necessary. To each Circuit there may be appointed a General Supervisor, nominated by the Superior Board, and totally dependant upon it. It should be his business to superintend the conduct of all the Inferior Boards within his jurisdiction; to inspect, from time to time, the different accounts depending before them; to send up, once in every month, an abstract of these accounts, to be laid before the General Board; to examine into the management of the whole business, to develop every species of misconduct, and to exercise a kind of censorial power in all those emergencies, where the ministration of a superior and disinterested person may be supposed to be particularly necessary.

Such

Such is the outline of that plan, which some experience of the insufficiency of the present system, and a continued reflection on the means of improving it, have suggested to the writer of these pages. If the observations, which he has thus submitted to the public, shall appear to be founded on general and constitutional principles, if they shall be thought to contain any thing which may benefit the interests or the commerce of this nation, the reader will pardon the presumption of him, who ventures to make known his imperfect sentiments on a subject, which has, so often and so fruitlessly, engaged the attention of those more experienced and more capable than himself.

The Jurisdiction allotted to the Palace Court by the Letters Patent of the Sixth of Charles the First, has since been confirmed by Letters Patent of Charles the Second, bearing date at Westminster, on the Fourth Day of October, in the sixteenth year of his reign. Where the Jurisdiction is originally illegal, and contrary to the laws and constitution of the country, no subsequent confirmation can make it good.

F I N I S.

